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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY, *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether a court of appeals may use a motion filed under the All Writs Act as a method of circumventing the statutorily prescribed procedures for review of agency orders.

2. Whether the court of appeals, by ignoring the statutory procedures governing orderly judicial review, has contravened the mandate of Section 506(a) of the Natural Gas Policy Act, 15 U.S.C. § 3416(a), and of 28 U.S.C. § 2112, which require review of orders of the Federal Energy Regulatory Commission on the record and preclude piecemeal review of such orders in different courts of appeals.

3. Whether the court of appeals, in circumventing statutory procedures and reviewing only one aspect of an agency order and leaving all other aspects of that order subject to review in a separate proceeding in a separate court of appeals, denied petitioners here their due process rights to be heard at a meaningful time and in a meaningful manner.

4. Whether the court of appeals impermissibly intruded upon the discretion of the Federal Energy Regulatory Commission to prescribe refund remedies and, without the benefit of the complete agency record, vacated refund procedures prescribed by that agency to effect such remedies.

LIST OF PARTIES TO THE PROCEEDING

The petitioners filing in this petition for a writ of certiorari are: Amoco Production Company; ARCO Oil and Gas Company, Division of Atlantic Richfield Company; Champlin Petroleum Company; Chevron U.S.A. Inc.; Cities Service Oil and Gas Corporation; CONOCO Inc.; Exxon Corporation; Gulf Oil Corporation; Mobil Oil Corporation; Mobil Oil Exploration & Producing Southeast Inc.; Mobil Producing Texas & New Mexico Inc.; Pennzoil Company; Phillips Oil Company; Phillips Petroleum Company; Placid Oil Company; Shell Offshore Inc.; Shell Western E&P Inc.; Sun Exploration and Production Company; Tenneco Oil Company; Texaco Inc.; The Superior Oil Company; and Union Oil Company of California.*

The respondents are American Iron and Steel Institute; American Paper Institute, Inc.; Associated Gas Distributors; El Paso Natural Gas Company; Interstate Natural Gas Association of America; Laclede Gas Company; Lone Star Gas Company; Louisiana Land & Exploration Company; Michigan Wisconsin Pipeline Company (now ANR Pipeline Company); Mississippi River Transmission Corporation; Natural Gas Pipeline Company of America; Northern Natural Gas Company; Process Gas Consumers Group; Texas Gas Transmission Corporation; Transcontinental Gas Pipeline Corporation; United Gas Pipe Line Company; Valero Transmission Company; and the Federal Energy Regulatory Commission.

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* Pursuant to Sup. Ct. Rule 28.1, a list of all parent companies, subsidiaries (other than wholly-owned subsidiaries), and affiliates of Petitioners is included in the Appendix at 153a-165a. This list is limited to entities with stock or debt securities publicly traded in the United States or Canada.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-———

PENNZOIL COMPANY, *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Pennzoil Company, *et al.* ("Producers") pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit in Nos. 81-1690, *et al.*, entered on March 5, 1985.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-15a) is reported at 756 F.2d 166 (D.C. Cir. 1985). The orders denying rehearing (App. 132a-135a (Scalia, J., dissenting)) and suggestions for rehearing *en banc* (App. 136a (Bork, Tamm, and Wright, J.J., not participating)) are not reported.

The orders of the Federal Energy Regulatory Commission ("FERC") (App. 16a-80a and 81a-126a) are re-

ported at 49 Fed. Reg. 37735 (Sept. 26, 1984) and 49 Fed. Reg. 46353 (Nov. 26, 1984).[1]

JURISDICTION

The judgment of the court of appeals (App. 130a-131a) was entered on March 5, 1985. The court of appeals denied petitions for rehearing on May 6, 1985 (App. 132a-135a (Scalia, J., dissenting)) and suggestions for rehearing *en banc* on May 15, 1985 (App. 136a (Bork, Tamm, and Wright, J.J., not participating)).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982) and 15 U.S.C. § 3416(a)(4) (1982).

STATUTES

Sections 506(a) and (b) of the Natural Gas Policy Act (NGPA), 15 U.S.C. §§ 3416(a) & (b) (1982), govern judicial review of FERC orders issued under the NGPA; those provisions are set forth at App. 141a-144a.[2] The All Writs Act, 28 U.S.C. § 1651 (1982), and 28 U.S.C. § 2112 (1982) also are germane to the instant case and are reproduced at App. 144a-148a.

The regulations affected by the decision of the court of appeals below are set forth at App. 53a-56a, 120a.

STATEMENT OF THE CASE

This case involves an instance in which a court of appeals utilized a motion filed under the All Writs Act to effect judicial review. In so doing, it undertook premature review at the request of a party that had no statutory standing to invoke the jurisdiction of the court as to issues that were not ripe for judicial review.

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[1] *Refunds Resulting From Btu Measurement Adjustments*, Order No. 399, 49 Fed. Reg. 37735 (Sept. 26, 1984), *on reh'g*, Order No. 399-A, 49 Fed. Reg. 46353 (Nov. 26, 1984), *petitions for review pend'g sub nom. Mobil Oil Exploration & Producing Southeast Inc., et al. v. FERC*, No. 84-4775 (5th Cir.).

[2] The NGPA is codified at 15 U.S.C. §§ 3301-3432 (1982).

The orders reviewed by the court of appeals arose in the aftermath of the D.C. Circuit's decision in *Interstate Natural Gas Association of America v. FERC* (*"INGAA I"*).[3] There, the court of appeals vacated FERC's regulation allowing the heat (Btu) content of natural gas to be determined on a "dry" basis for purposes of applying the maximum lawful prices prescribed in Sections 102-109 of the NGPA, 15 U.S.C. §§ 3312-3319.[4]

Thereafter, the FERC amended its regulations in accordance with the court's order;[5] no challenge to that amendment is presented here. The FERC also issued Order No. 399, directing that producers make refunds of any amounts collected pursuant to its vacated regulations.

Pursuant to Section 506(a)(2) of the NGPA, 15 U.S.C. § 3416(a)(2), various parties, including Producers, filed applications for rehearing of Order No. 399. Producers objected to, *inter alia*, the method adopted by the FERC for effecting refunds and the procedure for

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[3] 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1615 (1984), *vacating in part Final Rules For Part 270, et al.*, 45 Fed. Reg. 49077 (July 23, 1980) (Order No. 93), *on reh'g*, 46 Fed. Reg. 24537 (May 1, 1981) (Order No. 93-A), *reh'g denied*, 47 Fed. Reg. 614 (Jan. 6, 1982).

[4] 716 F.2d at 4, 16. The NGPA prescribes maximum lawful prices on heat content basis, *i.e.*, in amounts per "MMBtu" (million Btu's). A question arose whether, for applying the NGPA's maximum lawful prices, the heat content should be determined on the "wet" (water saturated) basis used to adjust ceiling rates established under the Natural Gas Act or on a "dry" basis, which reflected the actual, higher Btu content of the gas when delivered. In Order No. 93, the FERC concluded that the Btu content of gas should be determined on the "dry" basis. The court of appeals reversed the FERC, holding that the "wet" method must be employed.

[5] *Interpretative Rule For Btu Measurement Standard Under The Natural Gas Policy Act of 1978*, 49 Fed. Reg. 3072 (Jan. 25, 1984) (Order No. 356).

calculating the amount of those refunds. Respondent Associated Gas Distributors ("AGD") did not file an application for rehearing of Order No. 399.[6]

In Order No. 399-A, the FERC denied in part and granted in part the applications for rehearing that had been filed by the Producers and others. The FERC granted these applications for rehearing in part by providing that Btu refund obligations could be offset against sum-certain debts owed to producers under rulemaking orders prescribing adjustments to applicable maximum lawful prices for production-related costs.[7] In so acting, the FERC did not reduce the refund obligations; rather, it provided more flexible procedures for satisfying those obligations by permitting offsets of mutual debts in lieu of cash transfers. App. 90a-91a, 106a.

On the day that Order No. 399-A was issued, Mobil Oil Exploration & Producing Southeast Inc., one of the Producers, filed a timely petition for review of Order Nos. 399 and 399-A with the Fifth Circuit. *Mobil Oil Exploration & Producing Southeast Inc. v. FERC*, No. 84-4775 (5th Cir.) (*"Mobil"*). No party disputes that Mobil's petition was the first timely filed petition for review of Order Nos. 399 and 399-A; indeed, the court of appeals below acknowledged this in its opinion. App. 9a.

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[6] AGD is an informal association of approximately forty local distribution companies that sell and distribute natural gas in the eastern United States. AGD's members purchase most of their supplies of natural gas from interstate pipelines, which, in turn, purchase most of their supplies from numerous sellers, including Producers.

[7] In a series of rulemakings, the FERC adopted regulations implementing Section 110 of the NGPA, 15 U.S.C. § 3320 (1982). Under those regulations, producers are entitled to collect from their purchasers reimbursement for "production related costs" as an addition to the maximum lawful price.

On the next day, AGD filed with the D.C. Circuit a "Motion for Order Directing Compliance with Mandate" ("Motion"). In its Motion, AGD argued that the offset mechanism adopted in Order No. 399-A constituted a refusal by the FERC to implement the mandate of that court of appeals in *INGAA I*. AGD urged the court of appeals to exercise its extraordinary power under the All Writs Act, 28 U.S.C. § 1651 (1982), to issue a writ of mandamus directed against the FERC to compel it to implement what AGD viewed as the mandate of the court of appeals in the earlier case.

When it filed its Motion, AGD had not applied for rehearing of either Order No. 399 or Order No. 399-A. Thereafter, AGD filed with the Commission a timely application for rehearing of Order No. 399-A. The FERC then issued an order granting, *inter alia*, AGD's and other applications for rehearing for purposes of further consideration.[8] App. 127a-129a. Notwithstanding that its application for rehearing was then still pending before the FERC, AGD on January 18, 1985 filed a petition for review of Order No. 399-A in the D.C. Circuit.[9]

Producers, the Interstate Natural Gas Association of America, and the FERC filed responses in opposition to AGD's Motion before the D.C. Circuit. In their responses, they addressed the lack of merit of AGD's re-

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[8] Such an order tolls the statutory time established for denying rehearing and is not a final, reviewable order. *See, e.g., California Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969).

[9] *Associated Gas Distributors v. FERC*, No. 85-1043 (D.C. Cir.). Conoco Inc., one of the parties to the proceedings before the Commission, the D.C. Circuit, and the Fifth Circuit, filed a motion in the D.C. Circuit, pursuant to 28 U.S.C. § 2112 (1982), to transfer AGD's petition to the Fifth Circuit where the first petition for review of Order No. 399-A had been filed by Mobil. On May 17, after denying rehearing, the court of appeals dismissed AGD's petition for review as duplicative of AGD's Motion, which was the subject of the March 5 opinion.

quest for a mandamus against implementation of the offset mechanism. The court of appeals never requested full briefing on the merits of all challenges to Order Nos. 399 and 399-A. Further, the court of appeals gave no notice that AGD's Motion would be treated as a petition for judicial review rather than as an emergency motion under the All Writs Act. Nor had the agency record been filed with the court, a prerequisite to judicial review under Section 506(a)(4) of the NGPA.[10]

On March 5, 1985, the court of appeals acted upon AGD's Motion and issued a decision vacating the offset refund mechanism of FERC Order No. 399-A. *Interstate Natural Gas Association of America v. FERC*, 756 F.2d 166 (D.C. Cir. 1985). App. 1a-15a. Therein, the court of appeals did not address the merits of AGD's Motion under the All Writs Act. Rather, it determined that it would treat AGD's Motion as a petition for judicial review of Order No. 399-A under Section 506(a) of the NGPA, stating:

> We need not enter the debate over the propriety of resort to mandamus in this case, because, in any event, Associated Gas Distributors' motion to enforce the mandate may be treated as a petition to review that order.
>
> . . . .
>
> . . . Because the parties to the instant case have amply addressed the merits, no one will be prejudiced by considering Associated Gas Distributors' motion to enforce the mandate as a petition for review.

App. 9a, 11a.

Timely petitions for rehearing and suggestions for rehearing *en banc* were filed by Producers, the Interstate

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[10] The FERC had not filed the record with a court of appeals because the Fifth Circuit—the court of first filing—had deferred the filing of the agency record pending the D.C. Circuit's disposition of AGD's All Writs Act motion. App. 137a.

Natural Gas Association of America, and the FERC. On May 6, 1985, the panel denied those petitions in a *per curiam* order. App. 132a & 135a. Circuit Judge Scalia, who had originally concurred in the opinion of the court, withdrew his concurrence and entered a dissent in its place. In his dissent, Judge Scalia concluded that a writ of mandamus did not lie because the mandate of the court in *INGAA I* did not prescribe a particular refund mechanism, leaving the manner of effecting refunds to the FERC's discretion; that the petition for writ of mandamus could not be treated as a petition for review because AGD had not met the express and unequivocal statutory prerequisites to its seeking judicial review, as set out in NGPA Section 506(a)(2); and that if the petition for a writ were treated as a valid petition for review, it had to be transferred to the Fifth Circuit, where the first petition for judicial review of the orders had been filed. App. 133a-135a.

Thereafter, on May 15, 1985, the court of appeals denied the suggestions for rehearing *en banc*. App. 136a. Circuit Judges Wright, Tamm and Bork did not participate in the consideration of the suggestions for rehearing *en banc*.

On July 18, 1985, the FERC issued Order No. 399-B, attached hereto as a supplemental appendix. In that Order, issued in response to the D.C. Circuit's opinion, the FERC granted AGD's application for rehearing of Order No. 399-A. On that same day, one of the Producers, Mobil Producing Texas & New Mexico Inc., filed the first timely petition for review in the Fifth Circuit in No. 85-4485.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals subverts the integrity of the prescribed statutory procedure for obtaining judicial review of FERC orders issued under the NGPA, as well as under the Natural Gas Act and the Federal Power Act. These statutes require a party to file an

application for rehearing with the FERC and to have it denied, at least in part, as jurisdictional prerequisites to that party seeking judicial review. Thus, these statutes give the FERC the first opportunity to address a party's objections to its orders before a court of appeals may consider that party's petition for review.

Upon the filing of a petition for judicial review, further statutory provisions govern venue as between the several courts of appeals. Pursuant to 28 U.S.C. § 2112 (a), the agency "shall file the record in that [court] in which a proceeding with respect to [the agency's] order was first instituted." The filing of the full agency record with a particular court of appeals, under Section 506(a) of the NGPA, as well as equivalent provisions of the Natural Gas Act and the Federal Power Act, vests that court with exclusive jurisdiction and venue to review the agency's order, which review must be had on the basis of the record made before the agency.[11] Thereby, review can only occur in a single court of appeals; piecemeal review of a single agency order is statutorily precluded.

The court of appeals below ignored these statutory limits to its jurisdiction in order to impose its will on an administrative agency in a proceeding of interest to the court. In so doing, it granted judicial review to a party that had no statutory standing, to the prejudice of those who had properly perfected their right to judicial review before another court of appeals.

Under the decision of the court of appeals, a party seeking review of FERC orders under either the Natural Gas Act, the Federal Power Act, or the NGPA may now simply file a motion under the All Writs Act. It need not apply for rehearing before the agency; it need not

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[11] 15 U.S.C. § 3416(a)(4), *id.* at § 717r(b), 16 U.S.C. § 825*l*(b). 28 U.S.C. § 2112(a) gives the court in which exclusive jurisdiction and venue vests discretion to transfer the petition to another court of appeals where convenience of the parties or the interest of justice so requires.

await the agency's denial of the application; it need not have statutory standing to seek judicial review; it need not file a formal petition for review; and it need not await the filing of the agency record upon which review must be undertaken. Once filed, the All Writs Act motion takes precedence over all otherwise timely and proper petitions for review filed by parties having proper standing in other courts of appeals, and grants the filing party substantive review of its challenge wholly independent of the consideration of other parties' challenges. Further, by using the All Writs Act motion to effect review of the agency order, a court of appeals can evade the statutory requirements that (i) such review must be based on the record compiled before the agency, and (ii) such review of the agency's order must be undertaken by a single court of appeals.

The decision of the court of appeals, however, is not limited to those three acts administered by the FERC. Exhaustion of administrative remedies is a generally applicable principle of administrative law. Similarly applicable are the provisions of 28 U.S.C. § 2112, which invest a single court of appeals with the authority to review agency decisions on the record. Under the decision of the court of appeals, a party can secure preferential, substantive review of its particular challenge to an agency order by filing an All Writs Act motion, irrespective of the ripeness of the challenge or the potential for piecemeal review.

If this is to be the law, then all parties will, perforce, seek judicial review pursuant to the All Writs Act prior to exhaustion of their administrative remedies to ensure that their statutory right to judicial review is not foreclosed by similar motions of other parties. If the decision below is allowed to stand, it will fundamentally change the relationships among federal agencies and reviewing courts, among the various courts of appeals, and among parties before agencies. Thus, its result will have a

broad, deleterious effect on judicial review of administrative decisions generally.

Further, the court below violated the due process rights of the Producers. Producers have properly preserved challenges to the amount of refunds ordered by the FERC and have those objections pending before the Fifth Circuit. The court of appeals here granted preferential review of one party's objections to the agency's orders. Based upon that selective and limited review, the court below ordered the agency to amend its orders to require additional cash payments by Producers. Thereby, Producers were deprived of their property rights by the order of the court of appeals without a meaningful and timely opportunity to be heard in accordance with the statutory requirements on all matters relating to whether such additional cash payments should be ordered.

Finally, the court of appeals impermissibly encroached upon the discretionary authority of the FERC to structure refund plans. The court of appeals ordered the FERC, which was considering on rehearing the very objection to its order that was being urged by AGD before the court, to replace its refund procedures with a procedure that the court of appeals preferred, even though the court never had before it the complete record that the FERC had considered.

This Court should issue a writ of certiorari and review the decision below in order to maintain the integrity of the explicit statutory procedures and the continued viability of the controlling precedent relating to review of agency orders.

A. The Decision Below Conflicts With Statutory Provisions Governing Judicial Review And Well-Settled Principles Approved By This Court And The Courts Of Appeals.

Sections 506(a)(2) and (4) of the NGPA, 15 U.S.C. §§ 3416(a)(2) and (4), prescribe the procedure for ob-

taining judicial review of FERC orders issued under that Act.[12] Section 506(a)(2) provides in pertinent part:

> No person may bring an action under this section to obtain judicial review of any order of the Commission unless—
>
> (A) such person shall have made application to the Commission for a rehearing under this subsection; and
>
> (B) the Commission shall have finally acted with respect to such application.

Section 506(a)(4) then provides that judicial review is to be obtained by filing a written petition for review with an appropriate court of appeals "within 60 days after the final action of the Commission on the application for rehearing required under paragraph (2)[,]" and that "[n]o objection to such order of the Commission shall be considered by the Court if such objection was not urged before the Commission in the application for rehearing . . . ." 15 U.S.C. § 3416(a)(4).

The courts of appeals have consistently "recognized that a petition for rehearing is a jurisdictional prerequisite to judicial review of both NGPA and NGA [Natural Gas Act] claims."[13] Even the D.C. Circuit, until now,

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[12] Section 506(b), 15 U.S.C. § 3416(b), provides for judicial review of rulemaking orders like Order Nos. 399 and 399-A. Both the District of Columbia Circuit and the Fifth Circuit have held that the procedures set forth in Sections 506(a)(2) and (4) govern judicial review of such rulemaking orders. *INGAA I*, *supra*, 716 F.2d at 15; *Ecee, Inc. v. FERC*, 611 F.2d 554 (5th Cir. 1980).

[13] *Southern Union Gathering Co. v. FERC*, 687 F. 2d 87, 91 (5th Cir. 1982). *Accord, e.g., Ecee, Inc. v. FERC*, *supra*, 611 F.2d at 565-66; *Boston Gas Co. v. FERC*, 575 F.2d 975 (1st Cir. 1978); *Pan American Petroleum Corp. v. FPC*, 268 F.2d 827 (10th Cir. 1959). *See also, e.g., Utah Power & Light Co. v. FPC*, 339 F.2d 436, 437-438 (10th Cir. 1964) (construing similar provisions of Section 313 of the Federal Power Act, 16 U.S.C. § 825*l*).

has embraced this proposition of law and has recognized that it lacks jurisdiction to review a FERC order unless the petitioner has strictly observed the rehearing requirement.[14]

Unless statutory prerequisites for review have been satisfied, a court has no jurisdiction to undertake review of administrative orders. In *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965), this Court stated: "[W]here Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive." *Accord, City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (Federal Power Act); *FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497, 499 (1955) (Natural Gas Act).

In the case below, the party seeking review, AGD, had not followed the prescribed statutory procedure. Rather than first filing an application for rehearing of Order No. 399-A and waiting for the Commission to deny that application, as required by Sections 506(a)(2) and (4), AGD immediately sought judicial review under the aegis of an All Writs Act motion. It then sought agency rehearing.

Because AGD's Motion was not predicated upon an application for rehearing that had been denied by the FERC, the statutory provisions expressly precluded the court of appeals from treating AGD's Motion as a peti-

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[14] *See, e.g., Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124 (D.C. Cir. 1982); *Public Service Comm'n of N.Y. v. FPC*, 543 F.2d 757 (D.C. Cir. 1974); *Dayton Power & Light Co. v. FPC*, 251 F.2d 875 (D.C. Cir. 1958); *Michigan Consolidated Gas Co. v. FPC*, 167 F.2d 264 (D.C. Cir. 1948).

tion for review.[15] In these circumstances, both AGD's motion and its later filed petition for review were premature and jurisdictionally defective attempts to obtain judicial review of Order No. 399-A. Therefore, they "should [have been] dismissed." [16]

The statutory review procedures set out in Section 506(a) of the NGPA codify the well-established principle of administrative law repeatedly enunciated by this Court that:

> an administrative order is not "final," *for the purposes of judicial review*, until outstanding petitions for reconsideration have been disposed of. See, e.g., *Outland v. Civil Aeronautics Board*, 109 U.S. App. D.C. 90, 284 F.2d 224; *Braniff Airways, Inc. v. Civil Aeronautics Board*, 79 U.S App. D.C. 341, 147 F.2d 152.[17]

More recently, in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 541 (1970), this Court reiterated that: "[u]nless Congress provides otherwise,

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[15] The corollary of the rehearing requirement in NGPA Section 506(a)(2) is the principle set out in Section 506(a)(4) that an objection not raised or considered on rehearing may not be raised before a court of appeals on review. This Court has held that the provisions of Section 19 of the Natural Gas Act, 15 U.S.C. § 717r (the basis for Sections 506(a)(2) and (4) of the NGPA), and the related exhaustion doctrine preclude the courts of appeals from considering objections to an order that have not been presented to, and passed on by, the FERC. *FPC v. Colorado Interstate Gas Co., supra*, 348 U.S. at 498-500. The Court there held that even *sua sponte* consideration is precluded because it "would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission." *Id.* at 499.

[16] *California Co. v. FPC, supra*, 411 F.2d at 722; *General American Oil Co. of Texas v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969).

[17] *CAB v. Delta Airlines, Inc.*, 367 U.S. 316, 326 (1961) (emphasis in original). *Accord, FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 242-43 (1980); *FPC v. Metropolitan Edison Co.*, 304 U.S. 375, 383-386 (1938).

'[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied.' "

Here, Congress has not provided otherwise. To the contrary, NGPA Sections 506(a)(2) and (4) specifically provide that a party may not seek judicial review until after the FERC has finally denied that party's application for rehearing.

The court of appeals attempted to validate its treatment of AGD's Motion as a petition for review by citing other cases where courts of appeals had done so. However, none of the cases cited by the court of appeals in support of its treatment of AGD's motion as a petition for review arose under a statute like the NGPA, which requires final agency action denying a party's application for rehearing as a jurisdictional prerequisite to that party seeking judicial review. Rather, because the party in each of those cases could have initiated a review proceeding under the governing statute when it filed a petition for a writ of mandamus, its mandamus petition was treated as sufficient to constitute a notice of appeal under the governing statute.[18]

Here, however, AGD could not have filed a valid petition for review when it filed its Motion. Thus, AGD's Motion under the All Writs Act could not, under the

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[18] For example, the court below cited *National Organization for Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974) (*"NORML"*). There, a petition for mandamus filed within the time specified for seeking judicial review was treated as a petition for review under 21 U.S.C. § 877; Section 877 does not require an application for rehearing and agency action thereon as jurisdictional prerequisites to judicial review. The other cases relied upon by the court below were both criminal cases and have no possible application to review of agency determinations. *See United States v. Green*, 499 F.2d 538, 540 n.5 (D.C. Cir. 1974) (a petition for mandamus is adequate as a notice for appeal), and *Jordan v. United States District Court for Dist. of Col.*, 233 F.2d 362, 365 (D.C. Cir.), *vacated on other grounds*, 352 U.S. 904 (1956) (a petition for mandamus filed by a *pro se* criminal defendant is adequate as a notice of appeal).

cases cited by the court below, be treated as a petition for judicial review under the NGPA.[19]

In sum, the court of appeals below ignored the express statutory restrictions on judicial review under the NGPA and well-settled principles announced by this Court and the courts of appeals. A court of appeals is not free to disregard statutory procedures for judicial review, to the prejudice of petitioners who have followed such procedures, simply to impose its will upon an administrative agency in a proceeding of interest to it.[20] Whether the courts of appeals must observe explicit statutory and judicial principles governing judicial review of agency orders is an issue appropriate for this Court's consideration.

B. The Action Of The Court Of Appeals Results In Piecemeal Review Of The Same Agency Order In Different Courts Of Appeals, In Contravention Of The Statute And The Interests Of Judicial Economy.

Section 506(a) of the NGPA establishes a procedure whereby FERC orders properly subject to judicial review are reviewed on the record by a single court of appeals. This statutory scheme for effecting orderly statutory review is complemented by the venue provisions of 28 U.S.C. § 2112(a). The decision of the court of appeals

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[19] *Cf. American Public Gas Ass'n v. FPC*, 555 F.2d 852 (D.C. Cir. 1976). There, the court below recognized the limitations on treating a petition for a writ of mandamus as a petition for review. The court held that a mandamus petition filed by a party prior to denial by the agency of its application for rehearing could not be treated as a petition for judicial review for purposes of 28 U.S.C. § 2112(a) in determining the first filed petition for judicial review under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). Thus, under that court's own precedent, AGD's Motion could not be treated as the equivalent of a petition for review.

[20] That the issue presented was whether the FERC had complied with the court's earlier mandate in *INGAA I* did not relieve AGD of the statutory rehearing requirements. *Cf. Department of Fish and Game v. FPC*, 359 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 932 (1966).

below violated the mandatory requirements of both statutory provisions.

Section 506(a)(4) grants the court of appeals in which the agency record is filed *exclusive* jurisdiction and venue to review that order. Under 28 U.S.C. § 2112(a), the agency, in the first instance, must file the record in that court in which the first timely petition for judicial review of the agency's order was filed. The record must include the "order sought to be reviewed" and the pleadings, evidence, and other documents filed with the agency. 28 U.S.C. § 2112(b) (1982).

The courts of appeals, including the court of appeals below, have recognized "the importance of avoiding judicial review of 'piecemeal proceedings' and having 'one comprehensive judicial review proceeding, based on a full record.'" *Cities of Anaheim and Riverside v. FERC*, 692 F.2d 773, 779 (D.C. Cir. 1982). *Accord, Pennzoil Co. v. FERC*, 742 F.2d 242 (5th Cir. 1984). Indeed, the procedure for judicial review crafted by Congress in NGPA Section 506(a) and 28 U.S.C. § 2112(a) precludes piecemeal review of a single agency order. Yet the decision of the court of appeals in this case compels such piecemeal review, in direct contravention of the statutorily prescribed procedure and applicable precedents.

The first petition for review of Order Nos. 399 and 399-A was filed in the Fifth Circuit. The objections of the Producers to those orders are still pending before that court. Nevertheless, the D.C. Circuit undertook judicial review of only the objections raised by AGD to only one aspect of the refund orders without affording Producers any opportunity to argue the merits of their objections on appeal, and without undertaking any review on the basis of the agency record. Thereby, as a matter of law, the court of appeals violated the provisions of Section 506(a) of the NGPA and of 28 U.S.C.

§ 2112(a). Thus, as Judge Scalia observed in his dissent (App. 135a):

> The majority's action frustrates the Congressional policy of preventing piecemeal review and placing review in the court of first filing. If we do not dismiss this case as a meritless petition for mandamus (as we should), we must transfer the so-called appeal to the Fifth Circuit.

The piecemeal review compelled by the action of the court of appeals also violates fundamental policy considerations crucial to the administration of cases by the federal courts. Three basic objections have been presented to Order Nos. 399 and 399-A by different petitioners—or "deemed" petitioners such as AGD. The first objection to the orders, raised by Pitts Oil Company, is the question of whether refunds should have been ordered by the FERC at all. The second objection, raised by Producers, is whether the FERC has correctly determined, *as a matter of law*, the amount of refunds due.[21] The third objection, raised by AGD, is whether, assuming the amount of refunds determined by the FERC to be due is correct the method of payment for those refunds established by the FERC is appropriate—*i.e.*, the offset issue.

In an orderly review proceeding before a single court of appeals, the first objection would be decided, then the second, then the third. This order is required because a decision on the second and third objections could be rendered unnecessary if the first objection is sustained. Similarly, in the circumstances here presented, sustaining the objections of the Producers could largely, if not totally, moot the third objection.

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[21] Producers have challenged the legality of FERC's refund calculation. Section 504 of the NGPA, 15 U.S.C. § 3414 (1982), prohibits the FERC from ordering refunds of amounts collected which do not exceed the applicable maximum lawful price, plus all allowed adjustments and add-ons. Producers in their challenge have raised the issue of whether the FERC has attempted to order such repayments here.

The result is that the decision of the court of appeals below may be nothing more than an advisory opinion, depending upon the Fifth Circuit's resolution of the first two objections. At the same time, the court's decision could taint the review proceedings before the Fifth Circuit because the D.C. Circuit already has determined that refunds are to be made in cash, perhaps thereby implicitly predetermining the Fifth Circuit's consideration of the first two issues.[22] This situation has been aggravated now that the FERC has, in light of the D.C. Circuit's opinion, granted AGD's request for rehearing and ordered immediate cash payments, plus interest, by Producers.

The rendering of such an advisory opinion, particularly in light of its potentially prejudicial impact on another court's consideration of the remaining merits of the case, not only is inconsistent with sound principles of judicial administration but also violates the "case or controversy" requirements of Article III of the Constitution.[23] By comparison, effecting review of all objections to an order of the FERC before a single court of appeals in conformance with the requirements of Section 506(a) of

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[22] In their "Application for a Stay of Enforcement of a Judgment of the United States Court of Appeals for the District of Columbia Circuit" filed with Chief Justice Burger on May 23, 1985, in No. A-885, Producers argued that the decision of the court of appeals could foreclose their right to obtain judicial review on their objections at all. In response, as well as in subsequent pleadings filed with the Fifth Circuit, AGD argued that the D.C. Circuit's decision had not foreclosed Producers' opportunity to present their objections on appeal to the Fifth Circuit. If so, this is the very type of piecemeal review proscribed by the statutes. However, if AGD is wrong in its assertions, then a fundamental denial of Producers' due process rights has occurred. *See* Part C, *infra*.

[23] *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937) (jurisdiction of federal courts is limited to cases which present "a real and substantial controversy admitting of relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts"). *See Buckley v. Valeo*, 424 U.S. 1, 13 (1976); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

the NGPA and 28 U.S.C. § 2112(a) eliminates any potential violation of either sound judicial policy or the Constitution.

C. The Action Of The Court Of Appeals Denied Producers Due Process Of Law.

The Due Process Clause of the Fifth Amendment guarantees all persons an opportunity to be heard at a meaningful time and in a meaningful manner before being deprived of any property right.[24] This Court only recently reiterated that "the root requirement" of due process is a meaningful opportunity to be heard before being "deprived of any significant property interest." [25] Moreover, as the D.C. Circuit has noted, where statutory or regulatory procedures designed to afford timely and meaningful review are in place, due process requires "scrupulous compliance" with those procedures.[26]

As previously set out, the court of appeals did not follow the procedures prescribed in Section 506 of the NGPA and 28 U.S.C. § 2112(a) for review of FERC orders. This failure to observe statutorily mandated procedures governing judicial review has infringed upon Producers' Fifth Amendment right to secure *meaningful* and *timely* review of Order Nos. 399 and 399-A.[27]

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[24] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970).

[25] *Cleveland Board of Education v. Loudermill*, —— U.S. ——, 105 S.Ct. 1487, 1493 (1985).

[26] *Mazaleski v. Treusdell*, 562 F.2d 701, 719 (D.C. Cir. 1977).

[27] Whether due process rights have been violated frequently involves an *ad hoc* balancing of private and governmental interests, weighing the procedural protections that may be afforded to substantive private interests against the costs such protections would impose upon governmental interests. *See Mathews v. Eldridge, supra*, 424 U.S. at 335-36. However, in enacting Section 506 of the NPGA, Congress itself has weighed the competing interests and has declared that specified statutory procedures are required to protect the procedural interests of litigants, agencies and reviewing courts. Therefore, this Court should not countenance any departure from this statutory scheme.

The court of appeals attempts to gloss over this denial by baldly asserting that "because the parties to the instant case have amply addressed the merits, no one will be prejudiced by considering Associated Gas Distributors' motion to enforce the mandate as a petition for review." App. 11a. However, this attempt must fail.

Pending before the court was a motion under the All Writs Act claiming that Order No. 399-A violated the mandate of the court of appeals in *INGAA I*. The Producers and others—including the FERC—responded and opposed AGD's Motion, arguing that relief under the All Writs Act did not lie. The focus of the legal issues addressed by such response was substantively different from the legal issues that would have to be briefed under Section 506(a) of the NGPA in determining whether the FERC order must be sustained under standards governing review of agency orders.[28] Indeed, the limited focus of the motion papers is underscored by the fact that the court of appeals never had before it the full agency record, precluding by definition substantive review on that record as required by NGPA Section 506(a)(4).[29]

Further, the fundamental fairness required by due process was not afforded Producers by reviewing only the

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[28] *Compare United States ex rel. McLannan v. Wilbur*, 283 U.S. 414, 420 (1931) (setting out the standards for obtaining All Writs Act relief) *with Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983), and *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962) (setting out general standards for review of agency orders).

[29] In *NORML*, relied upon by the court below as supporting the proposition that a "petition for mandamus can do service as a petition for review" (App. 11a), the court of appeals treated a petition for mandamus as sufficient to effect an appeal only after first denying mandamus and ordering *further* consideration of the motion as a petition for judicial review. *NORML*, 497 F.2d at 656 n.3, 660. Thus, the court of appeals there implicitly acknowledged what it here refuses to admit: consideration of mandamus papers is not adequate to dispose of a case on the merits.

objection of one party to the FERC's order. Based on this selective review, the court of appeals required the FERC to amend its orders and to provide for additional cash refunds in lieu of offsets. Producers were given no meaningful opportunity to be heard at that time on their objections, which if sustained would largely negate, if not totally eliminate, the basis for an order for additional refunds by them of some $450 million. In denying Producers a timely opportunity to be heard, the court of appeals deprived them of their property rights without due process of law.

Accordingly, the decision of the court of appeals requiring Producers and others to make cash payments in lieu of offsets, without affording Producers any opportunity to be heard at a meaningful time and in a meaningful manner in accordance with the statutory requirements of Section 506 of the NGPA and 28 U.S.C. § 2112(a), constituted a denial of their fundamental due process rights in contravention of the Fifth Amendment.

D. The Court Of Appeals Failed To Defer To The FERC's Discretionary Authority To Fashion Refund Procedures.

The court of appeals could not have issued a writ of mandamus in the instant case. This is not an instance where the court of appeals, in harmless error, simply misnamed the action that it was taking. Rather, seeing that mandamus did not properly lie, the court improperly attempted to secure the same result indirectly by vacating FERC's Order No. 399-A offset provisions under a "deemed" petition for judicial review. However, without regard to whether the court's action is viewed as arising under the All Writs Act or under a petition for review, the court impermissibly intruded upon the broad discretion of the FERC to devise refund remedies.

1. *Mandamus did not lie.*

This Court has held that a writ of mandamus will not issue when the person to whom the writ is to be directed

has discretion to act.[30] The writ cannot be used to compel adoption of a particular remedy when the agency possesses broad discretion to determine what remedy, if any, is appropriate.[31] Because nothing in *INGAA I* either directed the FERC to order refunds or established the method for effecting any refunds ultimately ordered by the FERC, resort to mandamus was legally precluded.

Congress has invested in the FERC broad discretionary authority to regulate the natural gas industry. As this Court stated in *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968):

> [T]he breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties.

This Court has affirmed that FERC's discretion is equally broad in the specific context of its power to fashion appropriate procedures to effect the manner and timing of refunds.[32]

As observed by Judge Scalia in his dissent, AGD's request for mandamus was without merit because the FERC "retains discretion to determine both the amount and the manner of the refund." App. 133a. Nothing in

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[30] *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 661-662, 665-666 (1978); *Kerr v. United States District Court*, 426 U.S. 394, 402-403 (1976); *Will v. United States*, 389 U.S. 90, 95-96 (1967).

[31] *See, e.g., United States ex rel. McLannan v. Wilbur, supra*, 283 U.S. at 420 ("the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and . . . plainly defined. The law must not only authorize the demanded action but require it; the duty must be clear and indisputable.").

[32] *See, e.g., Mobil Oil Corp. v. FPC*, 417 U.S. 283, 314-17 (1974) (FPC has great flexibility in ordering refunds; refund workoff credit procedure is within agency discretion.). *See also Estate of French v. FERC*, 603 F.2d 1158, 1162-63 (5th Cir. 1979) ("FERC is to explore and give due weight to considerations of equity when imposing refund obligations.").

INGAA I abridged this discretion. Accordingly, mandamus did not lie.

2. *The court of appeals substituted its judgment for that of the agency.*

This Court has admonished the reviewing courts that they may not "substitute [their own] judgment for that of the agency." *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). As this Court emphasized in *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978), the reviewing court must "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good." Further, this Court has specifically emphasized the FERC's discretion to design appropriate refund procedures. *Mobil Oil Corp. v. FPC, supra*, 417 U.S. at 314-17.

By comparison, the court below ignored the admonition of this Court and, without foundation, intruded into the discretion reserved to the FERC by ordering that the FERC implement a refund remedy preferred by the court of appeals, which the FERC has now done in Order No. 399-B. This unfounded intrusion into the expertise of the FERC is even more egregious when considered in light of the absence of the full agency record before the court of appeals.

Because the court of appeals did not follow the orderly, statutorily mandated procedures set forth in Sections 506(a)(2) and (4) of the NGPA and *sua sponte* treated AGD's Motion as a petition for review, the record compiled before the FERC was never filed with the court of appeals. Judicial review *on the complete record compiled before the FERC* is required by Section 506(a)(4), which provides that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive," and by 28 U.S.C. § 2112(b). Because the agency record had not been filed with it,

the court of appeals had no basis for determining the propriety of the FERC's orders.

Of equal importance, by failing to have the complete record before it, and by failing to allow full briefing of all relevant objections and issues, the court of appeals resolved the issue of how refunds were to be undertaken without first determining the legal validity of the refunds ordered.[33] Thereby, the court's decision was rendered in a vacuum without consideration of the significant legal issues that had to be addressed before the validity of the FERC's offset mechanism could ever be reached.

Accordingly, a writ of certiorari should issue in this case to preserve the proper equilibrium between the authority of FERC and that of the court of appeals. This balance must be maintained to prevent the intrusion of the court of appeals into matters squarely within the expert discretion of administrative agencies.

CONCLUSION

Petitioners respectfully urge that a petition for writ of ceritorari be granted and that the decision of the court of appeals be vacated and remanded, with instructions to transfer the case to the United States Court of Appeals for the Fifth Circuit.

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[33] *See* n. 21 & accompanying text, *supra*.

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SUPPLEMENTAL APPENDIX

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa and Charles G. Stalon.

Docket Nos. RM84-6-015 through RM84-6-028

REFUNDS RESULTING FROM BTU MEASUREMENT ADJUSTMENTS

ORDER NO. 399-B

ORDER ON DIRECTION OF THE COURT VACATING, IN PART, ORDER NO. 399-A, AND ON PETITIONS FOR REHEARING AND RECONSIDERATION

(Issued July 18, 1985)

I. INTRODUCTION

The Federal Energy Regulatory Commission (Commission) is implementing the court's decision in *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission*,[1] by vacating the offset mechanism required by Order No. 399-A [2] and by granting five petitions for rehearing. The Commission otherwise denies all other petitions for rehearing, reconsideration and stay of Order No. 399-A.

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[1] Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission, 756 F.2d 166 (D.C. Cir. 1985) (INGAA-II).

[2] Refunds Resulting from Btu Measurement Adjustments, 49 Fed. Reg. 46,353 (Nov. 26, 1984).

II. BACKGROUND

On November 20, 1984, the Commission issued Order No. 399-A, which granted rehearing in part of Order No. 399.[3] Order Nos. 399 and 399-A implemented the decision of *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission*[4] by establishing refund procedures for overcharges resulting from adjustments to the calculation of the Btu content of gas sold under the Natural Gas Policy Act of 1978 (NGPA). On March 5, 1985, the United States Court of Appeals for the District of Columbia directed the Commission to vacate the portion of Order No. 399-A that required first sellers to offset Btu refunds against costs permitted under section 110 of the NGPA.[5] Order No. 399-A also permitted first sellers to seek a waiver of that portion of a first seller's refund obligation to the extent it is attributable to royalty interest owners and is uncollectible. The Commission received nine timely petitions for rehearing of Order No. 399-A.[6]

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[3] Refunds Resulting from Btu Measurement Adjustments, 49 Fed. Reg. 37,735 (Sept. 26, 1984) (issued Sept. 20, 1984) (Final Rule).

[4] 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1616 (1984) (INGAA-I) (charges for gas must be determined by measurement of Btu's (British thermal units) under "wet" conditions rather than the "as delivered" basis promulgated by the Commission).

[5] *See* n.1, *supra*. 18 C.F.R. § 271.1104(e) (1984); *see generally*, Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act, 48 Fed. Reg. 5152 (Feb. 3, 1983) (Order No. 94-A) (Final Rule and Order on Rehearing of Order No. 94). Appeal pending *sub nom.*, Texas Eastern Transmission Corp., *et al.* v. Federal Energy Regulatory Commission, No. 83-4390 (argued March 8, 1985, 5th Cir.).

[6] American Paper Institute, Inc., Industrial Users (*i.e.*, Process Gas Consumers Group and American Iron & Steel Institute), Florida Cities, Pitts Oil Company, *et al.*, Stauffer Chemical Company, Associated Gas Distributors, Memphis Light, Gas & Water Division, BTA Oil Producers, and a group of Indicated Producers.

The Commission also received five requests for an extension of the deadline for large first sellers to make refunds and a request to

III. DISCUSSION

A. *The Court's Decision Prohibiting the Offset of Section 110 Allowances*

The Court of Appeals quoted with approval the Commission's rationale in Order No. 399 for disallowing the offset of Btu refund obligations and section 110 charges. The court directed the Commission to vacate the offset portion of Order No. 399-A.[7]

As required by Order No. 399-A, many first sellers offset hundreds of millions of dollars of Btu refund obligations against uncontested section 110 charges in payment of Btu refunds. The Commission is now reversing that order, consistent with the instructions of the United States Court of Appeals.[8] Those first sellers that paid the Btu refund obligation by offsetting section 110 charges must now pay the Btu refund obligation in full.[9]

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modify the refund procedures. The Commission did not extend the deadline, or modify the refund procedures, because the petitions failed to present sufficient grounds for an extension.

In addition, five petitioners sought a stay of Order No. 399-A. These requests were not granted because the Commission did not believe "justice so require[d]," 5 U.S.C. § 705 (1982).

[7] INGAA-II, *supra*, at 171. The American Paper Institute, Industrial Users, Florida Cities, the Associate Gas Distributors and Stauffer Chemical Company objected to the requirement that first sellers' undisputed billings to pipeline-purchasers for section 110 allowances be offset against the first sellers' Btu refund obligation. Since the Court of Appeals' decision has afforded these petitioners the relief they sought in their petitions for rehearing, the Commission grants these petitions.

[8] The mandate issued May 20, 1985, the date of the Court of Appeals denial of the "Indicated Producers" motion for a stay. On June 3, 1985, Chief Justice Burger denied a petition for stay of the mandate.

[9] This refund payment may be in the form of one or more cash payments, or in the form of billing adjustments (if such billing adjustments are agreed to by the first seller), or a combination of these methods, as long as full payment is made by August 30, 1985.

Refunds must be made by August 30, 1985.[10] In all cases, interest accrues on the amount to be refunded until the date of payment, in accordance with Order No. 399.[11] In addition, interstate and intrastate pipelines are required to file refund reports similar to those required in Order Nos. 399 and 399-A. These additional reports are necessary to better monitor the payment of refunds by first sellers and interstate pipelines.

B. *Refund Obligations Attributable to Royalty Interest Owners*

Memphis Light, Gas and Water Division, (Memphis) protests the Commission's assertion of authority in Order No. 399-A to waive payment by first sellers of that portion of a Btu refund obligation attributable to royalty interest owners that is uncollectible. Memphis argues that the Commission lacks authority to waive the imposition of strict liability for the refund on first sellers. Alternatively, Memphis argues that there is no reason to waive this refund obligation because it derives from a first seller's payment of excessive royalties.

In Order No. 399, first sellers were made guarantors of payment of the portion of the Btu refund obligation attributable to royalty interest owners, primarily because the first seller, not royalty interest owners, collected

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[10] The disallowance of offsets does not affect the right of first sellers to defer payment of that portion of the Btu refund obligation attributable to royalty interest owners until actually collected or until November 5, 1986, whichever occurs first.

[11] The Indicated Producers argue that pipelines should pay the same interest rate on section 110 charges as the interest rate applicable to the Btu refunds. This issue is also mooted by the decision in INGAA-II because Btu refunds must be paid separately and distinct from section 110 charges. In any event, the interest rate applicable to Btu refunds was set by the Commission based upon public policy considerations. In contrast, the interest rate for section 110 charges is set by contract. For this reason, these interest rates may differ.

prices in excess of NGPA ceiling prices. On review, the Commission still believes it has discretion to waive payment of those portions of the refund obligation attributable to royalty interest owners, if the first seller demonstrates that the refund is uncollectible.[12] As stated in Order No. 399-A, the Commission will consider requests for a waiver on a case-by-case basis.[13]

C. *Responsibility of Operators*

Order No. 399 designated the operator as the one responsible for repayment of the entire refund for the time period it operated a well.[14] Specifically, the order required operators to notify all of the working interest owners of their refund obligations and to collect the refunds and pay them over to the pipelines. In addition, the Commission required operators to pay refunds owed by a defaulting working interest owner.

The Indicated Producers complain about the imposition of strict liability on a first seller that is the operator of a well for those refunds that are attributable to other working interest owners. They argue that an operator should not have to serve as a guarantor of refunds from other working interest owners that default on their portion of the refund.

The Commission recognizes that each working interest owner is a first seller and individually liable for the refund attributable to its interest in a well during the time the refund obligation accrued, as well as that portion of its refund obligation attributable to royalty interest owners. But, after further consideration of the issue, the Commission still believes it is necessary to designate

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[12] *See* Consumer Federation of America v. FPC, 515 F.2d 347, 359 (D.C. Cir. 1975).

[13] As established in Order No. 399-A, to the extent a filing fee exists for such a waiver, the Commission is waiving this filing fee.

[14] 49 Fed. Reg. 37,735, 37,740 (Sept. 26, 1984).

the operator as the one responsible for the payment of the entire refund for the time period that the operator operated a well in order to facilitate expeditious refunds as required by the court in *INGAA-I* and *INGAA-II*.

D. *Other issues*

Pitts Oil Company, Sage Energy Company, and Clayton W. Williams, Jr., Co. filed a petition requesting reconsideration of the same issues on which they sought rehearing of Order No. 399, asserting that Order No. 399-A and its predecessors failed to articulate a reasoned explanation for requiring refunds to implement the court's decision in *INGAA-I*.

As discussed in Order No. 399-A, the Commission believes that substantial equitable considerations support a discretionary order of refunds. Primarily, the consumers who paid excessive gas prices because of the incorrect measurement of the Btu content of that gas should benefit through the refund of overcharges. In any event, the opinion of the Court of Appeals in INGAA-II leaves no doubt that refunds were required to implement that Court's earlier decision in INGAA-I.[15]

To the extent petitioners have raised issues other than discussed above, the Commission believes those issues were previously considered and fully addressed in prior orders in this proceeding.

IV. EFFECTIVE DATE AND CLEARANCE BY THE OFFICE OF MANAGEMENT AND BUDGET

The refund reporting requirements established in this rule are information collection requirements under the Paperwork Reduction Act [16] and subject to Office of Management and Budget (OMB) approval.[17] Hence, the re-

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[15] INGAA-II, *supra* at 171.

[16] 44 U.S.C. §§ 3501-3520 (1982).

[17] 5 C.F.R. Part 1320 (1985).

porting requirements established in paragraph (F) below and § 154.38(h)(3)(viii) of the Commission's regulations are effective [insert date that is sixty days after publication in the *First Register*]. If OMB clearance has not been received by this effective date, the Commission will issue a notice temporarily suspending the effective date of the refund reporting requirements. The remaining portions of this order are effective [insert date that is thirty days after publication in the *Federal Register*].

V. THE COMMISSION ORDERS:

(A) That portion of Order No. 399-A that required the offset of Btu refund obligations and section 110 charges is vacated, and those petitions for rehearing that requested this relief are granted.

(B) First sellers must make refund payments for those amounts of Btu refund obligations that were previously paid by means of offsetting section 110 charges, by August 30, 1985, in accordance with Order No. 399.

(C) The parties to the first sale transaction may choose the method of payment of this refund, except that pipelines and first sellers may not offset Btu refunds and production-related costs permitted under section 110 of the NGPA. Those pipelines that have already begun to collect refunds by using billing adjustments without the consent of the seller can continue this method of payment only if the seller agrees. If the parties cannot agree, payment must be made in a lump-sum cash payment.

(D) Interest on Btu refunds must be calculated in accordance with §§ 154.102(c) and (d) of the Commission's regulations, except that any interest on money paid into escrow is the actual interest accrued in the escrow account on the amount required to be refunded.

(E) Any filing fee applicable to a request for a waiver, as described herein, is waived.

(F) By October 15, 1985, interstate and intrastate pipelines must file a refund report with the Commission detailing (1) the first sellers that made refunds, the refunded amounts that each pipeline has received, separately stated for each first seller, and indicating the principal amount and interest; and (2) the first sellers that have not made refunds, and the refund amounts due but not received by the pipeline, for each first seller, separately stating the principal amount and interest due from each first seller and the reason for nonpayment. Intrastate pipelines must file a copy of this report with the state regulatory agency having jurisdiction over such pipeline.

(G) All other petitions for rehearing, reconsideration, extension of time, and stay of Order No. 399-A are denied.

(H) In consideration of the foregoing, Part 154, Chapter I, Title 18, of the *Code of Federal Regulations*, is amended as set forth below.

List of Subjects: 18 C.F.R. Part 154

Natural gas

By the Commission.

(SEAL)

/s/ Kenneth F. Plumb,
KENNETH F. PLUMB,
Secretary.

1. The authority citation for Part 154 continues to read as follows:

AUTHORITY: Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352 (1982); Executive Order 12,009, 3 C.F.R. 142 (1978); Administrative Procedure Act, 5 U.S.C. §§ 551-557 (1982); Natural Gas Act, 15 U.S.C. §§ 717-717w (1982); Federal Power Act, 16 U.S.C. §§ 791a-828c (1982); Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (1982); Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-2645 (1982); Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976).

2. In § 154.38(h), paragraph (h)(3)(viii) is redesignated as paragraph (h)(3)(ix), and a new paragraph (h)(3)(viii) is added to read as follows:

§ 154.38 *Composition of rate schedule.*

* * * *

(h) *Pipeline recovery of Btu measurement adjustments.*

* * * *

(3) * * *

(viii) The pipeline must submit, not later than October 15, 1985, a refund report describing, for each source from which Btu refunds are obtained, those refunds received or paid (including deferred amounts paid) since filing the report under paragraph (h)(3)(vii) of this section. For those refunds subject to this paragraph, this report should show all the information enumerated in paragraph (h)(3)(vi).

* * * *

3. In § 154.38(h), newly-redesignated paragraph (h)(3)(ix) is amended by removing the phrase "paragraphs (h)(3)(vi) and (vii)", and inserting, in its place, the phrase "paragraphs (h)(3)(vi), (vii), and (viii)".

85-139

No. 85-

Office-Supreme Court, U.S.
FILED
JUL 25 1985
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY, *et al.*
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*
Respondents.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES REQUIRED BY RULE 28.1

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* Circuit Judge Scalia concurred originally, but, on rehearing, withdrew his concurrence and filed a dissent. Petitioners have printed both of Judge Scalia's opinions.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

MOBIL OIL CORPORATION, ET AL.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
MISSISSIPPI RIVER TRANSMISSION CORP.,
SHELL OIL COMPANY,
EXXON CORPORATION,
LACLEDE GAS COMPANY,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
NORTHERN NATURAL GAS COMPANY,
TEXAS GAS TRANSMISSION CORPORATION,
TEXACO, INC.,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
AMINOIL, USA, INC., ET AL., INTERVENORS

No. 81-1680

MICHIGAN WISCONSIN PIPELINE COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

MOBIL OIL CORPORATION, ET AL.,
AMOCO PRODUCTION COMPANY,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
EXXON CORPORATION,
SHELL OIL COMPANY,
TENNECO OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
LOUISIANA LAND & EXPLORATION COMPANY,
GETTY OIL COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
LACLEDE GAS COMPANY,
SUN OIL COMPANY,
ARCO OIL & GAS COMPANY,
PLACID OIL COMPANY,
TEXACO, INC.
GULF OIL CORPORATION, INTERVENORS

No. 81-1691

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

MOBIL OIL CORPORATION,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
SHELL OIL COMPANY,

ASSOCIATED GAS DISTRIBUTORS,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
TEXACO, INC.,
EXXON CORPORATION,
SUN OIL COMPANY,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY, INTERVENORS

No. 81-1692

NATURAL GAS PIPELINE COMPANY OF AMERICA,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

MOBIL OIL CORPORATION, ET AL.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
SHELL OIL COMPANY,
LACLEDE GAS COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
TEXACO, INC.,
SUN OIL COMPANY,
CHEVRON, USA,
EXXON CORPORATION,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY, INTERVENORS

No. 81-1696

LONE STAR GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
SHELL OIL COMPANY,
LACLEDE GAS COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
GETTY OIL COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
VALERO TRANSMISSION COMPANY,
TEXACO, INC.,
EXXON CORPORATION,
SUN OIL COMPANY,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
PANHANDLE EASTERN PIPE LINE CO., ET AL., INTERVENORS

No. 81-1802

LACLEDE GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

No. 82-1004

LONE STAR GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

EXXON CORPORATION,
CONOCO INC.,

GENERAL AMERICAN OIL COMPANY OF TEXAS,
PENNZOIL COMPANY,
TENNECO OIL COMPANY,
UNION OIL CO. OF CALIFORNIA,
GETTY OIL COMPANY,
AMINOIL USA, INC.,
GULF OIL CORPORATION,
TEXACO, INC.,
MOBIL OIL CORPORATION, ET AL.,
HOUSTON OIL AND MINERALS CORPORATION,
SHELL OIL COMPANY,
ATLANTIC RICHFIELD COMPANY,
SUN EXPLORATION AND PRODUCTION CO., INTERVENORS

No. 82-1177

ASSOCIATED GAS DISTRIBUTORS, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT

ON MOTION FOR ORDER DIRECTING
COMPLIANCE WITH MANDATE

Argued January 4, 1985

Decided March 5, 1985

Frederick Moring for petitioner, Associated Gas Distributors, on the Motion for Order Directing Compliance with Mandate.

Jerome M. Feit, Solicitor, Federal Energy Regulatory Commission, with whom *Joel M. Cockrell*, Attorney, Federal Energy Regulatory Commission, was on the Response to the Motion for Order Directing Compliance with the Mandate.

John H. Cheatham, III for petitioner, Interstate Natural Gas Association, was on Response to the Motion for Order Directing Compliance with the Mandate.

Kenneth J. Neises for petitioner, Laclede Gas Company, was on the Response to the Motion for Order Directing Compliance with Mandate.

J. Paul Douglas, Carroll L. Gilliam and *Robert D. Haworth* for intervenors, Producers, were on the Response to the Motion for Order Directing Compliance with Mandate.

L. Charles Landgraf and *Raymond N. Shibley* for intervenors, Panhandle Eastern Pipe Line Company, et al., were on the Response to the Motion for Order Directing Compliance with Mandate.

Glen S. Howard and *Edward J. Grenier, Jr.* for intervenors, Process Gas Consumers Group, et al., were on the Response to the Motion for Order Directing Compliance with Mandate.

Robert F. Shapiro and *Rigdon H. Boykin* for intervenor, American Paper Institute, Inc., were on the Response to the Motion for Order Directing Compliance with Mandate.

Before: ROBINSON, *Chief Judge*, MIKVA and SCALIA, *Circuit Judges.*

Opinion for the Court Per Curiam.

Concurring Opinion filed by *Circuit Judge* SCALIA.

PER CURIAM: On August 9, 1983, this court issued its opinion in *Interstate Natural Gas Association of America v. FERC*, 716 F.2d 1 (D.C. Cir), *cert. denied*, 104 S. Ct. 1615, 1616 (1983) (*Interstate*). We held that under the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq.* (1982), the Federal Energy Regulatory Commission's "dry" method of measurement of the Btu content of natural gas for wellhead pricing purposes was

improper and resulted in prices in excess of those permitted under the statute. We instructed FERC to vacate its Order designating the "dry" method. Two consequences of our decision were inexorable: implement the proper pricing method for future pricing decisions, and remedy the effects of past use of the improper pricing method at the earliest possible moment.

The *Interstate* parties are before us again, in response to the motion of petitioner Associated Gas Distributors to enforce our mandate in *Interstate*. For the reasons stated below, we direct FERC to implement the refund procedures set forth in Order No. 399.

I.

Following the issuance of our mandate, FERC moved to comply with its terms. FERC issued a rule requiring wet pricing henceforth, 49 Fed. Reg. 3072 (1984). In further implementation of our holding in *Interstate*, FERC issued Order No. 399 which directed producers to refund the excessive costs arising from use of the improper "dry" method of calculation:

> The Federal Energy Regulatory Commission (Commission) is amending and finalizing its regulations that establish refund procedures for overcharges resulting from adjustments to the calculation of energy content of natural gas . . . sold pursuant to the Natural Gas Policy Act of 1978. In so doing, the Commission is implementing [this court's] decision in *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission.*

49 Fed. Reg. 37735 (1984) (footnote and citation omitted).

Order No. 399, issued pursuant to the requisite notice and comment, established a system of refunds that fulfilled the premises of our decision. Under the Order, producers of natural gas were to refund to pipelines the

overcharges made under the improper "dry" method. These refunds were to be paid over by the pipelines to natural gas customers who had, in the first instance, paid these excessive charges. Under the Order, "large producers" were to have refunded their overcharges on November 5, 1984, while "small producers" were scheduled to issue their refunds on May 3, 1985. To date, no refunds have been made.

FERC explicitly prohibited producers from offsetting their refund obligations against any monies owed them by the pipelines. Order No. 399, 49 Fed. Reg. 37738-39. This prohibition had particular reference to claims the producers had made for additional monies due them under Section 110 of the Natural Gas Policy Act. FERC has issued Order No. 94-A allowing producers to collect these "Section 110 costs" from pipelines. 48 Fed. Reg. 5152 (1983). Order No. 94-A is now under review in the United States Court of Appeals for the Fifth Circuit. *Texas Eastern Transmission Corp. v. FERC*, No. 83-4390 (5th Cir. filed 1983).

In rejecting the use of offsets, FERC recognized not only that many of the Section 110 costs owed had not been paid, but also that tying these unrelated and disputed costs to refund of the improper "dry charges would delay and disrupt the implementation of our decision. FERC stated in Order 399:

> The Commission also believes that permitting offsets of section 110 costs and Btu refunds would complicate an already difficult process and would make Commission monitoring of Btu refunds more difficult. In addition, the Commission is concerned that permitting pipelines and firstsellers to offset section 110 costs and Btu refunds could prevent the Btu refunds from reaching as many of the customers actually overcharged as possible. Considering that the section 110 orders are also subject to judicial review, the Commission believes it is more appro-

priate to segregate the collection of section 110 costs from the Btu refunds.

49 Fed. Reg. 37739.

Two months after issuing Order No. 399, FERC abruptly reversed its postion on offsets, and, in Order No. 399-A, 49 Fed. Reg. 46353 (1984), FERC, without addressing the weighty rationale behind its earlier Order, authorized producers to offset their refund obligations by deducting monies due them under Section 110.

II.

Associated Gas Distributors has moved this court for an order commanding FERC to comply with our mandate by directing producers to make appropriate refunds to pipelines immediately, as set forth in Order No. 399. A petition for review of Orders No. 399 and 399-A is currently pending in the Fifth Circuit. *See Mobil Oil Exploration & Producing Southeast, Inc. v. FERC*, No. 84-4775 (5th Cir. filed Nov. 20, 1984). The Fifth Circuit, however, has issued an order delaying filing of the administrative record in *Mobil* until after this court issues its ruling in the present case. Accordingly, jurisdiction in the instant matter properly lies in this court. *See* 15 U.S.C. § 3416(a)(4).

The availability of mandamus to confine FERC to the terms of this court's mandate is fully supported by precedent. *See, e.g., Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Yablonski v. UMW*, 454 F.2d 1036, 1038-39 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). FERC protests, however, that our mandate did not reach so far as to preclude the offset authorized by Order No. 399-A. We need not enter the debate over the propriety of resort to mandamus in this case, because, in any event, Associated Gas Distributors' motion to enforce the mandate may be treated as a petition to review that order.

Federal appellate courts have broadly recognized that the filing of a paper substantially equivalent to one that formally inaugurates the normal review process may well suffice for that purpose. Thus the need for a notice of appeal may be satisfied by any of a variable host of filings evincing unequivocably an intention to appeal. *See, e.g., Belton v. United States*, 259 F.2d 811, 814 (D.C. Cir. 1958) (*en banc*) (letter requesting leave to appeal in forma pauperis) (citing cases); *Riffle v. United States*, 299 F.2d 802 (5th Cir. 1962) (letter to judge of court of appeals). The reason is that the content requirements of a notice of appeal, *see* Fed. R. App. P. 3(c), may easily be met by a document of similar import, and the interests of justice may demand its acceptance as an effective substitute. *See* 6 C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice § 3949 at 356-57. Indispensably, any such filing must take place within the period allowed for initiation of an appeal. *Alley v. Dodge*, 501 F.2d 880, 881-82 (D.C. Cir. 1974); *see also Johnson v. United States*, 405 F.2d 1072, 1073 n.6 (D.C. Cir. 1981).

These considerations exert equal force in the situation before us. A petition for review need only "specify the parties seeking review and designate the respondent and the order or part thereof to be reviewed," Fed. R. App. P. 15(a), and undeniably Associated Gas Distributors' motion did that. The motion, filed the day following issuance of Order No. 399-A, was well within the time petitions for review are indulged, and the relief sought is as much obtainable on direct review of the agency's action as it is in a mandamus proceeding. Indeed, precisely because direct review and mandamus may provide identical relief, these two judicial actions may be sought in the alternative. *See, e.g., United States v. Green*, 499 F.2d 538, 539-40 & nn.4, 5 (D.C. Cir. 1974); *Chase v. Robson*, 435 F.2d 1059, 1060, 1062 (7th Cir. 1970). We

have heretofore held that a petition for mandamus can do service as a petition for review. *National Organization for Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654, 656 n.3 (D.C. Cir. 1974). Similarly, petitions for mandamus have been treated as notices of appeal, *United States v. Green*, 499 F.2d at 540 n.5; *Jordan v. United States District Court*, 233 F.2d 362, 365, *vacated on other grounds*, 352 U.S. 904 (1956), and vice versa, *Dellinger v. Mitchell*, 442 F.2d 782, 789 (D.C. Cir. 1971); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 197 (3d Cir.), *cert. denied*, —— U.S. —— (1983). Because the parties to the instant case have amply addressed the merits, no one will be prejudiced by considering Associated Gas Distributors' motion to enforce the mandate as a petition for review.

III.

Turning then to the substance of the dispute before us, we conclude that the offset provision contained in Order No. 399-A must be set aside. As stated above, FERC issued Order No. 399, in which offsets were explicitly prohibited. Shortly thereafter, FERC issued Order No. 399-A, in which offsets were permitted. While an agency may change its course, it can do so only with a full and complete explanation that would withstand judicial review. FERC's Order No. 399-A does not meet that requirement. Without such an explanation, the agency's decision may be arbitrary and capricious. *Dunlop v. Bachowski*, 421 U.S. 560, 577 (1975). More fundamentally, Order No. 399-A defies the teaching of the Supreme Court in *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962) (*Tennessee Gas*). In that case, the Court held that refunds must be implemented expeditiously:

> [I]t is the duty of the Commission . . ., where refunds are due, to direct their payment at the earliest possible moment consistent with due process.

Id. at 155. The rationale for prompt ordering of refunds is clear: "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Commission*, 360 U.S. 378, 388 (1959). The Court in *Tennessee Gas* required immediate refunds even though delaying refunds would have allowed a more accurate allocation of the burden of payment to the gas pipeline, and the immediate payment ordered might have resulted in some loss to the pipeline due to the inaccurate allocation.

FERC's prohibition of offsets was well-considered. The controversy over production-related costs to be recouped by producers under Section 110 constitutes unsettled litigation wholly separate from the instant case. As such, permitting producers to offset their refund obligations would bring delay and confusion into an already complex area. Moreover, the principles of law and the customers involved in the refund arrangement are far from identical to those implicated in the Section 110 costs proceedings. By prohibiting offsets, FERC designed the system most likely to assure that customers will receive refunds due them. Involving disparate issues in a matter on appeal to another court can only complicate, delay, and obfuscate the refunds at issue here.

The law requires the ordering of refunds at the earliest possible moment. That moment has come and gone. The offset scheme embodied in Order No. 399-A will only further delay refund of the overcharges, circumventing our mandate in *Interstate* and the clear instruction of the Supreme Court in *Tennessee Gas*. We accordingly grant the relief sought by petitioner Associated Gas Distributors. We hereby direct FERC to vacate the offset portion of Order No. 399-A, for the reasons set forth in its own Order No. 399.

It is so ordered.

SCALIA, *Circuit Judge*, concurring: Prior to our decision regarding the unlawfulness of "dry-gas" pricing in *Interstate Natural Gas Ass'n of America v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1615 (1984) (*"INGAA"*), the Commission had promulgated regulations allowing gas producers to collect from pipelines certain delivery and compression costs relating to previously sold gas—so-called "Section 110 costs," *see* 15 U.S.C. § 3320(a)(2) (1982). 18 C.F.R. § 271.1104 (1984). When Order No. 399-A was issued, many of those costs had still not been paid, and seemed unlikely to be paid within the time period prescribed by regulation. *See* C.F.R. § 274.1104(e)(3). The Commission feared that customers who had used the gas to which the Section 110 costs pertained might switch pipelines before the costs were paid and reflected in rates, saddling "captive" future customers with the full burden of their pipelines' obligations. This was of special concern in light of other Commission rulings enabling customers to change pipelines more readily. *See Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Commodity Bill Provisions*, 49 Fed. Reg. 22,778 (1984) (to be codified at 18 C.F.R. § 154.111). Additionally, decontrol of wellhead prices for large quantities of flowing gas was then pending. *See* 15 U.S.C. § 3331 (1982). Since a major purpose of decontrol was to rectify the supply-demand imbalance in the interstate gas market, the Commission wanted post-1984 prices of new gas to reflect wellhead costs, not to be distorted by Section 110 costs incurred prior to decontrol.

These concerns led the Commission in Order No. 399-A to require undisputed Section 110 costs owed by the pipelines to the producers to be offset against the dry-gas refund obligations owed by the producers to the pipelines. Because the time periods covered by the refund and Section 110 proceedings overlap substantially, 49 Fed. Reg. 46,353, 46,356-57 (1984) (to be codified at 18 C.F.R. § 154.38), an offset mechanism promotes "intergenera-

tional equity," *id.* at 46,357, by allocating effective liability for Section 110 costs to the consumers who benefitted from the producers' activities. *See id.* at 46,356 (offsetting Section 110 costs against refunds "come[s] closer to matching the customers who are entitled to Btu refunds with the customers who received the benefits or caused the incurrence of section 110 costs"). The offset procedure also enables "gas producers . . . to settle their long-past due accounts for section 110 services rendered and their liability for Btu refunds without disrupting current or future natual gas prices," *id.* at 46,357, and allows pipelines to "enter the era of decontrol and enhanced competition without the burden of attempting to pass through producers' bills for services rendered years ago." *Id.*

In seems to me that the prescription of the Supreme Court and of this court that refunds, when due, be made "at the earliest possible moment consistent with due process" does not exclude such delay as may be needed to make sure that the refund goes to those customers who, taking all appropriate factors into account, are entitled to it. As described above, the whole purpose of the agency's action in this case was to insure that those who received unjust enrichment as a result of wrongful failure to assess Section 110 costs do not receive refunds which, on a net basis, they are not entitled to. Moreover, even giving a more stringent interpretation to what "the earliest possible moment consistent with due process" might be, it does not seem to me that this court can properly say that in fact a refund has not been made. Whether the Section 110 debt is being contested in court or not, *if it is in fact owed the set-off constitutes immediate payment.* Here the Commission has found it to be owed (the pending proceedings in the Fifth Circuit do not suspend that determination, *see* 15 U.S.C. § 3416 (a) (5) (1982)), and we have no basis for proceeding on any other assumption, in disregard of a valid Commission order.

I nonetheless concur in the judgment because I believe that the agency's action, however well intentioned, constitutes an attempt to increase rates retroactively. It is well established that even when past rates were fixed at unlawfully low levels, the Commission cannot provide for recoupment. *See FPC v. Tennessee Gas Co.*, 371 U.S. 145, 152-53 (1962); *Public Service Co. of New Hampshire v. FERC*, 600 F.2d 944, 957-61 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979). The rule is important in order to enable distributors to determine their prices for resale—prices which *they* may not be able to revise retroactively. Just as a refund is no less a refund by virtue of the fact that it is effected through an offset, so a retroactive rate increase is no less a retroactive rate increase when it is achieved in that fashion. *See Belco Petroleum Corp. v. FERC*, 589 F.2d 680, 687 (D.C. Cir. 1978). I would reverse the Commission's action on these grounds.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Part 154]

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

Docket Nos. RM84-6-000, RM84-6-001, and RM84-6-002

REFUNDS RESULTING FROM BTU MEASUREMENT ADJUSTMENTS

ORDER NO. 399

FINAL RULE AND ORDER DENYING REHEARING OF INTERIM RULE

(Issued September 20, 1984)

I. *INTRODUCTION*

The Federal Energy Regulatory Commission (Commission) is amending and finalizing its regulations that establish refund procedures for overcharges resulting from adjustments to the calculation of the energy content of natural gas (measured in terms of British thermal units (Btu's))[1] sold pursuant to the Natural Gas Policy Act of 1978. In so doing, the Commission is implementing the decision in *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission (INGAA)*.[2]

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[1] Each Btu represents the amount of energy needed to raise the temperature of one pound of water one degree Fahrenheit.

[2] 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1616 (1984).

As a result of the *INGAA* decision, the Commission issued an interim rule on May 3, 1984, requiring refunds of Btu overcharges.[3] Briefly stated, the interim rule requires first sellers to refund the Btu measurement overcharges by November 5, 1984, or in the case of small first sellers, by May 3, 1985. First sellers and pipelines may choose whether the refund should be paid in a lump-sum cash payment or in billing adjustments over the refund period. In either case, the refund obligation is subject to the Commission's interest regulations in §§ 154.67 (c) and 154.102(c) and (d). Interstate pipelines must then pass the refunds through in a lump-sum cash payment to those customers actually overcharged. The interim rule also requires both intrastate and interstate pipelines to file refund reports with the Commission describing those refunds received and those refunds still outstanding.

This final rule adopts the requirements of the interim rule with major clarifications or modifications in five areas. First, the rule prohibits offsets of the Btu measurement overcharges (Btu refunds) and production-related costs permitted under section 110 of the Natural Gas Policy Act of 1978 (NGPA). Second, first sellers may defer payment of Btu refund amounts attributable to royalty interest owners until the first seller receives payment from the royalty interest owner, or November 5, 1986, whichever occurs first. First sellers that defer payment of that portion of the Btu refund attributable to royalty interest owners must notify the pipelines of the deferral before the end of the applicable 6- or 12-month refund period. Third, additional reports will be required from intrastate and interstate pipelines in order to monitor these deferred refund amounts. Fourth, the interest owed on Btu refund amounts that were placed in escrow is limited to that interest which accrued

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[3] Refunds Resulting from Btu Measurement Adjustments, 49 Fed. Reg. 19,293 (May 7, 1984).

in the escrow account on the amount required to be refunded. Finally, a small first seller must notify pipelines if that first seller is going to use the 12-month refund period.

II. *BACKGROUND*

In *INGAA*, the court vacated the Commission's regulations that prescribed the method used to calculate the energy content of natural gas for purposes of applying the maximum lawful prices under the NGPA.[4] Those regulations provided that the Btu content of a given volume of natural gas is determined by assuming that the volume of natural gas was under standard test conditions when delivered to a pipeline. Once the Btu content of the natural gas was determined assuming standard test conditions, an adjustment was permitted to reflect the number of Btu's actually delivered to the pipeline system (dry rule).[5]

In vacating these rules, the court held that the Commission's dry rule was fundamentally at odds with the Congressional intent under the NGPA. Specifically, when the NGPA was passed in 1978, it established maximum lawful prices for several categories of natural gas and incorporated in sections 104 and 106(a) of that act area rates that the Commission had established under the Natural Gas Act (NGA). Pursuant to the Commission's

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[4] These regulations were adopted in Order Nos. 93 and 93-A. Rules Generally Applicable to Regulated Sales of Natural Gas, 45 Fed. Reg. 49,077 (July 23, 1980) (Order No. 93); Order Denying Rehearing and Clarifying Order No. 93, 46 Fed. Reg. 24,537 (May 1, 1981) (Order No. 93-A).

[5] An adjustment was permitted because 1) the gas delivered to a pipeline is seldom saturated with water vapor, as required under standard test conditions; and 2) water vapor contains no valuable heat energy, and its presence in an given volume of natural gas would reduce the Btu content of the gas by displacing energy-producing hydrocarbons. *See* 18 C.F.R. § 270.204 (1983).

NGA regulations (wet rule), the Btu content of a given volume of gas was measured under standard test conditions (saturated) instead of actual delivery conditions. Although this derivation of Btu content tended to overstate the water vapor content which, in turn, caused an understatement in the number of Btu's assumed to be in a given volume of natural gas delivered to a pipeline, it enjoyed widespread industry acceptance and consistent Commission implementation.[6] Hence, the court reasoned that the wet rule was the only method Congress knew for measuring Btu content; and, therefore, it held that Congress incorporated the Btu measurement technique used under the NGA, *i.e.*, the wet rule, into the pricing structure of the NGPA.

The Commission issued a Notice of Inquiry in this docket on January 19, 1984.[7] The interim rule was issued on May 3, 1984, and a public hearing was held on May 24, 1984. The Commission received two petitions for rehearing of the interim rule and it granted rehearing solely for the purpose of further consideration of those petitions.[8] In response to its request for comments in the interim rule, the Commission received seventy written comments.

Numerous commenters generally support the interim rule and urge that it be adopted as the final rule. One commenter urges the Commission to reconsider all of its options to be sure that a refund rule is necessary. Other commenters complain that it will be impossible to comply

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[6] Prices were established under the NGA in dollars per thousand cubic feet ($/Mcf). The Commission then permitted adjustments to the area or national rate for the Btu content of gas measured under the wet rule.

[7] Refunds Resulting From Btu Measurement Adjustments, 49 Fed. Reg. 3198 (Jan. 26, 1984).

[8] Refunds Resulting From Btu Measurement Adjustments; Order Granting Rehearing for the Purpose of Further Consideration, 49 Fed. Reg. 27,935 (July 9, 1984).

at reasonable cost with the interim rule's collection and reporting timetable and that the problems created by the interim rule are insurmountable for small producers. Finally, one commenter states that the realities of the natural gas industry and fundamental fairness warrant changes in the rule.

When the Commission promulgated the dry rule, it believed that the dry rule was an appropriate method permitted by Congress for measuring the Btu content of natural gas under the NGPA. The court in *INGAA* disagreed. We are now left with the task of implementing the court's decision. After careful consideration of the written comments, the views and arguments expressed at the public hearing on May 24, 1984, and the decision in the *INGAA* case, the Commission believes that the interim rule, as modified by this rule, fairly balances the interests of sellers, purchasers, and consumers of natural gas.

III. *PRODUCER REFUNDS TO PIPELINE*

The *INGAA* decision held that the maximum lawful prices under the NGPA must be calculated using the wet rule. The Commission decided in the interim rule that any person who received a price for the first sale of gas in excess of the NGPA ceiling prices calculated using the wet rule must refund the overcharges. Specifically, any first seller that collected revenues in excess of the product of (a) the applicable maximum lawful price established by the NGPA, and (b) the quantity of MMBtu's (million Btu's) determined on the basis of the wet rule (*i.e.*, under standard test conditions), must refund any such excess revenues.[9] To the extent that revenues collected for gas sold in a first sale under the NGPA are less than or equal to the level of revenues thus calculated, and are

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[9] Section 270.101(e) imposes a general refund obligation on any person that receives a price in excess of the maximum lawful price under the NGPA. 18 C.F.R. § 270.101(e) (1983).

contractually authorized, no excess revenues would have been collected, and no refunds are due.[10]

Commenters argue that the Commission has the discretion not to order refunds because refunds are not explicitly required by either the NGPA or *INGAA*. These commenters assert that the Commission must weigh equity and the public interest in its retroactive application of the *INGAA* decision and they argue that these considerations render full refunds inappropriate for several reasons. First, commenters argue that sellers made countless investment decisions in good faith reliance on the Commission's rules adopted in Order Nos. 93 and 93-A. Second, the *status quo* cannot be restored since insufficient records are available to determine refund liabilities because the records were destroyed, were never kept, or are unorganized. Third, individual consumers will not receive the benefit of the refunds because restitution is not possible. Fourth, the administrative cost of recouping the refunds will be burdensome on first sellers and pipelines. Finally, refunds will discourage new drilling and production and further depress the natural gas production market. In addition, one commenter states that

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[10] For purposes of determining the maximum permissible level of revenues for sales of natural gas subject to section 105(b)(1) of the NGPA, the terms of the contract control, *unless* those terms result in revenues in excess of the level of revenues that would have been collected based on the product of (a) the NGPA section 102 price, and (b) the quantity of MMBtu's determined on the basis of the wet rule (*i.e.* under standard test conditions). In any instance where revenues were collected in excess of the level of revenues determined by the product of (a) and (b), those excess revenues must be refunded. In those instances where the level of revenues collected was less than or equal to the level of revenues determined by the product of (a) and (b), and are contractually authorized, no excess revenues would have been collected, and no refunds are due. In some instances, no refund may be due under this rule but a party may believe a refund is due under the contract. The Commission believes that these disputes are a matter of State law to be resolved in State court.

there is a serious question whether the Commission has the power to order these refunds because first sellers relied on the Commission's rules.

The Commission disagrees with these comments. Under the *INGAA* decision, the NGPA, and the Commission's implementing NGPA regulations, the Commission believes that it is legally required to order refunds in this situation. Specifically, the NGPA establishes ceiling prices and makes it unlawful for a first seller to receive a price in excess of the maximum lawful price. If the Commission did not make the measurement rule retroactive and did not require refunds, it would effectively be establishing a ceiling price higher than the maximum lawful prices prescribed in the NGPA. Since the NGPA does not contain any provision allowing the Commission to change the maximum lawful prices except in very limited circumstances,[11] it cannot waive the refund obligation. While the Commission recognizes that there are administrative costs associated with the refund process and that perfect restitution to overcharged customers may not be possible, it believes that the overriding legal considerations require the Commission to establish a refund mechanism that attempts to substantially refund overcharges to consumers.

Commenters assert that the *de minimis* principle for pipeline refunds in them interim rule should be expanded and applied to first sellers and royalty interest owners so

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[11] The Commission does have the authority to establish a higher just and reasonable rate—in other words, a new maximum lawful price—for gas sold under NGPA sections 104, 106, and 109. In addition, the Commission has the authority under NGPA section 107(c)(5) to establish a special price necessary to provide reasonable incentives for producing high-cost gas. However, in order to use these sections as a means of not requiring refunds, the Commission must meet the statutory requirement of demonstrating that the new price is just and reasonable, in the case of sections 104, 106, and 109, or necessary to provide incentives under section 107(c)(5).

as to waive the refund obligation for *de minimis* Btu refund amounts. These commenters suggest *de minimis* amounts of $500 and $2,000 per individual royalty interest owner to significantly reduce the inequities of any refund obligation. Although the Commission is sympathetic to these requests, the Commission believes, for the reasons discussed above, that the NGPA does not provide any legal mechanism for the Commission to waive the refund requirement.

A. *Refund Period*

The interim rule established two refund periods. Specifically, a 12-month refund period was established for those first sellers who sold a total of ten million Mcf (10 Bcf) or less of gas in both the intrastate and interstate markets in 1983 (small first sellers), and a 6-month refund period was established for all other first sellers.

While many commenters support the 6-month and 12-month refund periods, other commenters argue that these periods were too long. In contrast, some commenters argue that these refund periods are too short to generate refund calculations or to permit verification of the refund obligation and that these refund periods will cause cash flow problems. Commenters also suggest alternative refund periods, such as, expanding the deadlines to two years for all producers, but requiring the payment of estimated refunds within 6 months and final adjustments within 24 months.

The Commission has carefully balanced the need to refund overcharges to consumers as expeditiously as possible against the administrative burdens and potential cash flow problems associated with the refund process. The Commission believes that the 6-month and 12-month refund schedule is an appropriate compromise between these competing interests. First, the natural gas industry has been aware of the pending decision in *INGAA*, and certainly has had the opportunity to prepare for this

contingency, for some time. For example, some first sellers and their purchasers escrowed these funds pending review by the U.S. Court of Appeals and the Supreme Court. Second, the refund periods provide the first seller and the pipeline sufficient time to agree on a repayment schedule and to make the payment, if a schedule has not already been worked out.

With respect to "large" first sellers, such sellers generally should have sufficient cash flow from all operations to pay their refund liability within six months, and should generally be able to borrow funds to the extent their operations do not generate sufficient cash flow. However, in order to accommodate problems unique to many "small" first sellers, an extended 12-month refund period was provided for first sellers who sold a total of ten million Mcf (10 Bcf) or less of gas in both the intrastate and interstate markets in 1983. The Commission believes that, on balance, these considerations justify the 6-month and 12-month refund periods.

With respect to the definition of small first seller, several commenters support using the test used under the NGA as opposed to the one defined in the interim rule. They argue that the NGA test is well established, is easy to monitor, and would reduce the administrative burden on pipelines and producers. Another commenter notes that, under the interim rule definition, fewer first sellers will qualify for the 12-month refund period than under the NGA definition because the interim rule definition includes sales made in both interstate and intrastate markets. This commenter suggests raising the threshold to 12.5 Bcf to compensate for the inclusion of intrastate sales in the definition.

The Commission notes that the NGA definition of small producer and the definition used in the interim rule are intended to serve different purposes. The NGA definition of small producer is used to waive filing requirements under the Commission's NGA regulations. In contrast,

the definition of small first seller in the interim rule is used to determine those first sellers that are most likely to have cash flow problems if required to meet a 6-month refund deadline. This definition, unlike the NGA definition, also includes sales in the intrastate market because the Btu refund obligation applies to intrastate as well as interstate sales. Since the NGA definition and the interim rule definition are intended to serve different purposes, the interim rule definition applies to a different group of sellers, *i.e.*, first sellers who sold a total of ten million Mcf (10 Bcf) or less of gas in both the intrastate and interstate markets in 1983.[12] The commenters do not offer any compelling reasons why the interim rule definition would not serve those purposes.

Commenters suggest that the Commission permit pipelines to assume a seller is large, unless the first seller notifies the pipeline otherwise. The Commission has adopted this suggestion because it will facilitate the refund process and help pipelines complete their refund reports without imposing an undue burden on small first sellers. Hence, the rule requires small first sellers who are not making refunds within the 6-month refund period to notify pipelines in writing of their small first seller status by November 5, 1984.

B. *Method of Payment*

Under the interim rule, first sellers are required to make lump-sum cash payments of the overcharged amounts, unless both the first seller and the pipeline

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[12] For the purpose of determining eligibility as a small first seller, a first seller need not include sales made as a royalty interest owner or by affiliated entities.

The Commission is concerned that an operator may not qualify as a small first seller for refund purposes, but that one or more of the sellers that designated that operator may have qualified as a small first seller as defined in this rule. In this situation, the operator may wait until May 3, 1985, to pay that portion of the Btu refund attributable to those small sellers, but the operator must notify pipelines of this deferral by November 5, 1984.

agree to payment through billing adjustments. This approach was taken because both repayment methods have merit and it permits pipelines and first sellers a degree of flexibility in deciding the most advantageous method to refund the Btu overcharges.

One commenter argues that first sellers do not need flexibility because first sellers have had long term use of the money, and have been aware of the pending refund obligation for some time. In addition, another commenter argues that the Commission should permit pipelines flexibility to withhold payments they owe first sellers in order to retire the refund obligation, because a right to withhold guarantees that all refunds are paid.

Although the Commission is aware that first sellers have had long term use of the refund money and that first sellers have been aware of a potential refund obligation for some time, it believes that first sellers should have sufficient flexibility to prevent excessive cash flow problems. Similarly, the Commission will not permit pipelines unilaterally to decide to withhold payments because this procedure may unnecessarily cause first sellers to experience severe cash flow problems. Hence, this rule permits the parties to determine which of these methods of payment is best suited to their financial situations.

C. *Section 110 Offsets*

Since 1983, the Commission has permitted first sellers to retroactively collect production-related costs authorized by contract under section 110 of the NGPA (section 110 costs).[13] Since the Btu refund period and the surcharge

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[13] *See* Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act, 48 Fed. Reg. 5152 (Feb. 3, 1983) (Order No. 94-A) (Final Rule and Order on Rehearing of Order No. 94); 48 Fed. Reg. 24,039 (May 31, 1983) (Order No. 94-C); (Order Denying Rehearing and Denying Petitions for Stay); 49 Fed. Reg. 565

period for section 110 costs are approximately the same, some commenters propose that the Commission should require, or alternatively, permit, first sellers and pipelines to offset Btu refunds and section 110 costs.

Seven commenters oppose the allowance of offsets and nine commenters favor it. In addition, one commenter argues that first sellers have a right to offset section 110 costs and Btu refunds. Those commenters favoring offsets argue that it will prevent financial difficulties, that it provides an excellent match between those overcharged for Btu refund amounts and those responsible for the section 110 costs, and that section 110 costs and Btu refunds accrued over the same time period. Those commenters opposing offsets argue that the Btu refund question is final while the section 110 cost issue is in litigation, that the time periods affected by these orders are different, and that section 110 costs are decided on a case-by-case basis.

The Commission intended the procedures for collecting section 110 costs to be self-implementing. In contrast, the Commission has decided that specific refund procedures are necessary for Btu refunds and that this refund procedure should be closely monitored. Because of the strict timetables and other requirements established for the payment of Btu refunds, the Commission is concerned that offsets could undermine contract disputes as to whether a pipeline owes section 110 costs to a first seller. The Commission also believes that permitting offsets of

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(Jan. 5, 1984) (Order No. 94-E) (Clarification of Order No. 94). *See also,* Delivery Allowances Under Section 110 of the Natural Gas Policy Act of 1978, and Compression Allowances Under Section 110 of the Natural Gas Policy Act of 1978, 48 Fed. Reg. 5180 (Feb. 3, 1983) (Interim Rule); 48 Fed. Reg. 44,495 (Sept. 29, 1983) (Order No. 334, Final Rule and Order Granting in Part and Denying in Part Rehearing of Interim Rule); 49 Fed. Reg. 56 (Jan. 3, 1984) (Order No. 334-A, Order Denying Application for Rehearing Of Order No. 334 and Denying Requests for Stay of Order No. 334).

section 110 costs and Btu refunds would complicate an already difficult process and would make Commission monitoring of Btu refunds more difficult. In addition, the Commission is concerned that permitting pipelines and first sellers to offset section 110 costs and Btu refunds could prevent the Btu refunds from reaching as many of the customers actually overcharged as possible. Considering that the section 110 orders are also subject to judicial review, the Commission believes it is more appropriate to segregate the collection of section 110 costs from the Btu refunds. For these reasons, the Commission is prohibiting the offset of section 110 costs and Btu refunds.

D. *Interest*

The interim rule adopted the Commission's refund policy, codified in § 270.101(e) (general refund obligation) that requires the first seller to calculate the refund plus interest under § 154.102(c) of its regulations. The interim rule also continued a longstanding Commission policy of waiving the interest payment for that portion of a refund attributable to payment of royalties or taxes to Federal or State governmental authorities unless those governmental authorities make interest payments on those refunds.[14] In addition, a first seller's refund obligation is not satisfied until the interest obligation is satisfied.

Commenters argue that the Commission should waive the entire interest requirement because first sellers were not unjustly enriched, and the overcharged amounts were

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[14] *See* 18 C.F.R. § 273.302(e)(2)(i) (1983); and 49 Fed. Reg. 19,293, 19,299 (May 7, 1984) (to be codified at 18 C.F.R. § 154.102(d)).

In the interim rule, the Commission amended § 154.102 to include a new paragraph (d) that was inadvertently removed by Order No. 47. *See* 49 Fed. Reg. 19,293, 19,295 n.10 (May 7, 1984). The Commission is finalizing this amendment.

reinvested in exploration, drilling, and production. These commenters characterize the interest obligation as a tremendous burden and they state that the interest obligation will drive companies out of business. Other commenters argue that the rate of interest is too high, and one commenter suggests using the interest rate on 90-day treasury notes.

The Commission is not persuaded that a valid reason exists for waiving the interest requirement entirely or generally revising the interest rates. In addition, the Commission believes that fairness to consumers and pipelines dictates that first sellers pay interest on the Btu refund amounts at the rate established in the interim rule. As stated in the interim rule, interest charges reflect a reimbursement to the rightful owner of the value of the use of funds held by first sellers. The Commission's existing regulations for calculating interest are used because the Commission believes that these regulations have already balanced the interests of sellers and purchasers.[15]

Some commenters suggest that the Commission limit the interest on Btu refund amounts which were paid into escrow to the interest that accrued in the escrow account, because money held in escrow earned a rate of return different from the prime rate. The Commission agrees that the only interest which should be refunded on escrowed amounts should be the accrued interest in the escrow account, since first sellers did not have use of this money and since an escrow procedure protects the interests of both the consumer and the seller. The Commission believes these are valid reasons for limiting the interest obligation for money paid into escrow to that interest which accrued in the escrow account on the

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[15] A table showing the interest rates applicable to the Btu refund is available from the Commission's Division of Public Information, Rm. 1000, 825 North Capitol Street, N.E., Washington, D.C. 20426, (202) 357-8118. (Ask for "Btu Refund Interest Rate Table").

amount required to be refunded. Moreover, this procedure is consistent with § 273.302(e)(2)(ii) of our regulations for interim collections of maximum lawful prices by first sellers pending NGPA well category determinations.[16]

Commenters request clarification on the date interest begins to accrue. Under this rule, interest begins to accrue on the date that the overcharged amount was received by the first seller, except for Btu payments that were paid into escrow and for refunds attributable to payment of royalties or taxes to Federal or State governmental authorities. In the latter situation, interest begins to accrue on the date that the first seller receives the refund from the governmental royalty interest owner.

E. *Refunds for Section 107(c)(5) Gas*

Under NGPA section 107(b), the Commission has the authority to prescribe a higher incentive price for any first sale of high-cost gas to the extent a higher price is necessary to provide reasonable incentives to produce that gas. The Commission has issued such regulations for high-cost tight formation gas,[17] and production enhancement gas.[18]

In the interim rule, the Commission declined to make the necessary section 107(c)(5) finding for raising the ceiling price for such gas to compensate for Btu overcharges. Commenters state that the section 107(c)(5) price should not be reduced because of *INGAA*. They argue that the Commission chose the section 103 price as

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[16] 18 C.F.R. § 273.302(e)(2)(ii) (1983).

[17] Regulations Covering High-Cost Natural Gas Produced From Tight Formations, 45 Fed. Reg. 56,034 (Aug. 22, 1980).

[18] High-Cost Natural Gas: Production Enhancement Procedures, 45 Fed. Reg. 77,421 (Nov. 24, 1980); 48 Fed. Reg. 45,097 (Oct. 3, 1983) (Order Granting Rehearing in Part and Denying Rehearing in Part).

a convenient marker for settting the price for section 107(c)(5) gas and is not bound to that price.

The Commission believes it has the authority to establish a maximum lawful price for section 107(c)(5) gas based on the Btu content of the gas as delivered provided the statutory finding in section 107(b) is met. However, in establishing incentive prices, the Commission determined that the incentive ceiling price for tight formation gas is the lesser of the negotiated contract price or 200 percent of the section 103 price and that the incentive ceiling price for production enhancement gas is the lesser of the renegotiated price or the section 109 price. Since the section 107 prices were based on sections 103 and 109, the rules applicable to those sections should apply to the section 107 rates that are pegged to those other ceiling rates. Commenters do not offer any compelling reasons to justify a higher ceiling price for section 107(c)(5) gas or any factual data to support the statutory requirements in section 107(b). Accordingly, if a first seller has collected these maximum lawful prices based on the dry rule, refunds are due. Of course, if the contract price is less than the ceiling price, then the contract price is not changed by this rule. To the extent that contract-related rates are set on a dry basis, they must be converted to a wet basis solely for purposes of making the comparison to ensure that the ceiling rate is not breached.

F. *Generation of Refund Information*

Commenters argue that the rule should require pipelines to supply first sellers a full and complete data sheet of the information necessary to determine the Btu refund amounts. Commenters note that most first sellers cannot calculate the Btu refunds without information from the pipelines, and they argue that purchasers are in the best position to supply that information. One commenter notes that without an information exchange, the computation

and verification of refunds will be a difficult and burdensome task that will cause considerable delay and make the 6-month deadline unrealistic. Other commenters oppose a standard form mandated by the Commission because any data exchange should be left to the parties.

One commenter argues that the rule should require that the amount of Btu overcharge be determined by the party responsible for submitting the invoices that included Btu adjustments. In addition, one commenter argues that purchasers should be required to provide the necessary information in sufficient time to meet deadlines. One pipeline states it will invoice its producers, but argues that first sellers must continue to bear the legal obligation to assure that the calculations are accurate and refunds properly paid. Another pipeline states that it will cooperate with first sellers to determine the correct refund amounts owed plus interest.

The Commission realizes that pipelines typically do the paperwork necessary to prepare the invoices for the gas taken from first sellers. However, we believe that the parties are in the best position to decide who should determine the amounts owed because, in some instances, pipelines require the first seller to do the paperwork to invoice for the gas taken; and in other instances, the first seller may not have sufficient information to calculate the refund obligation without additional information from the pipeline. The Commission also believes that pipelines and first sellers should cooperate. Specifically, first sellers are liable for the refunds, but pipelines have an obligation under the NGA as part of prudent management to ensure that first sellers pay these refunds, promptly and properly.

G. *Refund Payments by Royalty Owners*

Many first sellers of natural gas have a contractual agreement with a landowner to pay that owner a royalty payment based on a certain percentage of the proceeds

the first seller receives for the natural gas. The interim rule provided that a seller incurs a refund liability for all the proceeds received in a first sale, and that he must refund the entire overpayment, including that percentage originally paid to the royalty owner. However, in those cases where several sellers have designated an operator to both collect revenues and disburse payments covering working interests and royalty interests, the interim rule designates the operator as the one responsible for repayment of the entire refund.

Some commenters argue that operators should not be responsible for refunds attributable to royalty interest owners. Other commenters argue that it is unclear whether royalty interest owners must pay this refund. One commenter asserts that the refund obligation should be placed on the royalty interest owners where it belongs.

Commenters also complain that collecting refunds from royalty interest owners will be impossible because royalty interest owners may have become judgment-proof, the well may have changed ownership, or the well may have been plugged. Other commenters suggest that first sellers and operators should be required to collect refunds on a "best-efforts" basis, and that operators should not be responsible for refunds if the royalty interest owner is unable to pay, if the refund is uncollectible by law, or if the refund is not otherwise collectible from a royalty interest owner.

Two commenters complain that while the amount they are owed by royalty interest owners is large, the cost of collection may exceed this amount. Another commenter argues that operators should be permitted an offset for the costs of collection. Finally, commenters note that one State, Wyoming, is refusing to make any refunds of overpayments of royalties; and that the Department of Interior has time-consuming procedures and may refuse to pay portions of the overpayment of royalties. These commenters argue that the rule should exempt or defer re-

fund amounts attributable to States and the Department of Interior until they pay the royalty amounts they owe.

The Commission recognizes the problems that first sellers may have in recovering money from royalty interest owners. However, receipt of a first sale price in excess of the statutorily-set maximum lawful price is a violation of the NGPA, and the Commission has no authority to adjust these ceilings, except in certain limited circumstances not applicable here.[19] Numerous first sellers collected first sale prices in excess of the maximum lawful prices under the NGPA, since they priced gas based on the Btu content of the gas delivered to the pipeline. Therefore, these sellers incurred a refund liability, and it is their responsibility to refund the entire overpayment, including that percentage paid to royalty interest owners. Some sellers may have placed the Btu overcharge amounts in escrow pending a decision in *INGAA*, and do not face the task of securing refunds from royalty interest owners. For other sellers who failed to forsee this contingency, the Commission believes that securing refunds is a part of doing business. In addition, the Commission does not have jurisdiction over royalty interest owners, and, therefore, it cannot order royalty interest owners to make refunds.[20] Hence, the Commission is not changing the requirement that first sellers are responsible for the entire Btu refund.[21] However, the Commission is aware that operators change and working interests in wells are assigned to others. Therefore, the Commission is clarifying that an operator is

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[19] *See* n.11, *supra.*

[20] *See* Mobil Oil Corp. v. FPC, 463 F.2d 256 (D.C. Cir. 1972), *cert. denied,* 406 U.S. 976 (1972), *reh'g denied,* 409 U.S. 902 (1972), and *reh'g denied,* 409 U.S. 903 (1972).

[21] In addition, the Commission has also held single parties responsible for all refunds in other circumstances under the NGA. *See* Tenneco Oil Company v. FPC, 442 F.2d 489 (5th Cir. 1971); and Sauder v. DOE, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981).

responsible for refunds only during that period of time he operated a well and a first seller is responsible for refunds only during that period of time he owned an interest in a well, except as provided otherwise by contract, deed, or lease.

While the Commission is not relieving first sellers of their responsibility for the entire Btu refund, the Commission is concerned that first sellers may have difficulty making timely collection of that portion of the Btu refund amounts attributable to some royalty interest owners, including some States and the Department of Interior. In order to permit first sellers sufficient time to collect these monies, the Commission is permitting first sellers to defer that portion of the Btu refund attributable to royalty interest owners until the first seller receives payment from the royalty interest owner or November 5, 1986, whichever occurs first. However, the Commission stresses that first sellers should make every effort to collect and pay the entire Btu refund within the appropriate 6- or 12-month time limits. The Commission expects that the Department of Interior will make most of the refunds it owes in a timely manner, especially those refund amounts attributable to the period after November 9, 1981.[22] Those first sellers who defer the royalty interest owner portion of the Btu refund must notify pipelines of the deferral before the end of the applicable 6- or 12-month refund period.

The Commission realizes that a few first sellers who are diligently seeking refunds from royalty interest owners will be unable to meet the November 5, 1986, time limit. In these situations, a first seller may always seek a further deferral of the refund under section 502(c) of

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[22] *See* Refund Procedures and Order to Pay Royalties, 49 Fed. Reg. 31,779 (Aug. 8, 1984). *See also* 88 Int. Dec. 1090 (1981).

Commission staff will also initiate talks with the Department of Interior to help facilitate payment of the refunds owed by the Interior Department.

the NGPA. However, the Commission is not inclined to grant such applications unless the circumstances and inequities require it. In any event, the first seller must pay interest under the provisions of this rule until the entire Btu refund is paid to the purchaser.

H. *Refund Reports by Interstate and Intrastate Pipelines*

The interim rule requires interstate and intrastate pipelines that are purchasers in a first sale to file two refund reports. These reports describe the status of the first seller's refund obligation by detailing 1) those first sellers that have made refunds and the amount of refunds received, and 2) those first sellers that have not made refunds, the amount owed, and the reasons for nonpayment. The first report would be filed by December 18, 1984, which is 45 days after the last day of the six-month first seller refund period. The second report would be filed by July 3, 1985, which is 60 days after the last day of the 12-month refund period. Because the State regulatory agencies will be interested in monitoring the refund process, the interim rule requires intrastate pipelines to file a copy of their report with the State agency having jurisdiction over intrastate sales. The interim rule requests comments on the reporting requirements imposed on intrastate pipelines.

Most commenters addressing the intrastate reporting requirements support these requirements because they properly balance the interests of the States, participants and the public. Due to the magnitude of the refunds, the complexity associated with monitoring them, and the long term nature of the overcharges, the Commission is adopting the interim rule reporting requirements for interstate and intrastate pipelines already discussed with the modifications discussed below.[23] Specifically, the Com-

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[23] The authority to require these reports is encompassed within the Commission's general authority in section 501(a) of the NGPA

mission recognizes that it would be administratively infeasible to monitor refunds from all natural gas first sellers without the aid of refund reports from interstate and intrastate pipelines. In addition, the Commission intends to institute a comprehensive audit program for all refunds that are still unpaid at the end of the appropriate refund period.

The interim rule also requests comments on the Commission's decision not to require refund reports from all first sale purchasers. Commenters argue that reporting requirements should not be expanded to Hinshaw pipelines or local distribution companies (LDCs). They state that most State commissions already have strict requirements for refunds by LDCs and that the Commission lacks jurisdiction over LDCs to order refund reports. In addition, these commenters assert that refund reports by Hinshaw pipelines and LDCs would impose unnecessary costs and serve no valid purpose, since pipeline reports and Commission audits are sufficient to monitor compliance; and that refund reports would place duplicative and perhaps conflicting demands on LDCs. In contrast, other commenters argue that the final rule should require refund reports from all first sale purchasers in order to monitor the flow of refund monies.

The Commission does not believe that reports from every first sale purchaser are necessary to properly monitor this refund process. In addition to those reasons stated by the commenters, the Commission believes that refund reports from all first sale purchasers are unnecessary because sales of natural gas which are not made to interstate and intrastate pipelines comprise a small proportion of the total sales made in the natural gas market.

"to perform any and all acts * * * as it may find necessary or appropriate to carry out its functions" under the NGPA, which functions include ensuring that the maximum lawful prices are not exceeded in any first sale transaction.

One commenter argues that the refund reports should be expanded to include a statement of the total amount due from each first seller with amounts broken down by principal and interest. The Commission believes that the refund reports should separately state principal and interest and that this information is necessary to properly monitor the refund process. Consequently, the reporting requirements are modified to require that refund reports show the amounts of principal and interest received.

As discussed previously, this rule extends the period during which sellers may pay refunds from royalty interest owners. In view of this extension, an additional report will be necessary at the end of that two-year deferral period in order to facilitate the monitoring by the Commission of the refund process. Hence, intrastate and interstate pipelines must file a third and final refund report by January 5, 1987, detailing 1) those first sellers from whom refunds have been received since May 3, 1985, and 2) those first sellers from whom refunds have not been recovered and the reason for the nonpayment.[24]

One commenter argues that any reports by intrastate pipelines should be made only to the appropriate State regulatory agency and not the Commission. Other commenters suggest removing the requirement to give reasons for nonpayment by producers, since the pipeline may not know and finding out will be burdensome and pointless. These arguments are rejected because the Commission needs refund reports from intrastate pipelines to ensure that first sellers comply with this rule. Similarly, the Commission requires pipelines to provide the reasons for nonpayment by a first seller because that information is necessary to monitor Btu refunds and pipelines are in

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[24] This report will be due 60 days after November 5, 1986, or January 5, 1987. But, the second report will be due by June 17, 1985, which is 45 days, instead of 60 days, from May 3, 1985, because the second report is no longer the final refund report.

the best position to obtain that information from the first seller.

IV. *PIPELINE REFUNDS TO CUSTOMERS*

Under the NGA, the Commission has jurisdiction over the rates that interstate pipelines charge to their customers. This rule expands and clarifies the regulations promulgated by the interim rule to pass through any refunds pipelines receive from first sellers and other pipelines.

A. *Refund Period and Method of Payment for Interstate Pipelines*

The interim rule notes that each pipeline has a mechanism in its purchase gas adjustment clause (PGA) to pass through refunds received from first sellers by reducing the pipeline's unrecovered purchased gas costs, which costs would normally be recovered from the pipeline's customers over the next 6-month period. But, because the Btu refund was accrued over a 5-year period and because the refund amounts are large, the interim rule requires interstate pipelines to make lump-sum cash payments to those customers actually overcharged from December 1, 1978, instead of adjusting their current rates.

Commenters argue that, in addition to those reasons stated in the interim rule, the Commission should use the PGA mechanism for several reasons. First, the PGA mechanism permits pipelines to retain markets by reducing current costs. Second, it reduces accounting and administrative burdens, since pipelines need not establish new procedures to verify, allocate and distribute the Btu refunds. In contrast, other commenters argue that passing the refunds through the PGA mechanism will distort the current and future costs of gas, will cause serious inequities (especially to past customers who do not currently purchase gas), and will delay signals to producers

that the market cannot bear the high gas prices already being charged.

Similarly, some commenters support the lump-sum refund mechanism based on historical purchases. They argue that lump-sum refunds avoid allocation problems, prevent unfairness, are more accurate, avoid market distortions and provide State commissions with maximum flexibility. Other commenters describe the lump-sum method as fair, equitable and reasonable. In addition, one commenter notes that the lump-sum mechanism will benefit those customers whose conservation efforts decreased their use of gas.

The Commission believes that the use of the PGA mechanism to pass through these refunds could result in inequities. For example, customers which do not now purchase gas from an interstate pipeline would not receive a refund with a PGA pass-through, and it would be unfair if the customers actually overcharged did not receive a refund in the same proportion to their overcharges, given the magnitude and long-term nature of the overcharges.

In contrast, the Commission believes that the lump-sum mechanism is a fair and equitable procedure. Specifically, the lump-sum mechanism ensures that refunds will be made to those customers who overpaid the pipelines, and this mechanism will return the refunds to the ultimate consumer more quickly. Finally, the Commission recognizes that the Btu refund may temporarily disrupt the current gas market. But, the Commission believes that a lump-sum cash payment requirement will disrupt the current natural gas market less than the use of the PGA mechanism, since a lump-sum cash payment is made to those overcharged and does not adjust current prices. For these reasons and for the reasons stated in the interim rule, this rule requires interstate pipelines to make lump-sum cash payments to those customers actually overcharged from December 1, 1978.

The interim rule also requires interstate pipelines to pay Btu refunds to those customers actually overcharged within 15 days of receipt of the refunds from a first seller, or pay interest from the first day the refund was received from the first seller until paid. In order to reduce the administrative burden on pipelines, the interim rule permits pipelines to defer lump-sum payment to its customers until it has accumulated refunds equivalent to one mill per Mcf or Dkt for the pipeline's 1983 annual sales. In no event could the pipeline defer payment for more than 120 days or 30 days after the last refund period. If the pipeline defers payment more than 15 days, the pipeline is liable for interest from the date it receives the refunds from the first seller until the pipeline paid its jurisdictional customers.

The interim rule also notes that, to the extent a pipeline's refunds are *de minimis*, it may request a waiver of the lump-sum payment requirement. In addition, if a pipeline has already paid the first seller the Order No. 93 costs, but has not yet amortized those paid costs, then the interim rule permits the pipeline to offset these unamortized amounts against the jurisdictional portion of the refunds received. Because of the magnitude of the refunds, and for the reasons discussed below, the Commission is adopting these requirements with minor modification.

The Commission notes that pipelines were apparently confused about how to allocate refunds to their customers actually overcharged. Specifically, two commenters argue that pipelines must allocate refunds based on the historical sales made by a pipeline during the period of Order No. 93 overpayments. One commenter will base a customer's refund on the customer's *pro rata* portion of total purchases during the PGA periods in which Order No. 93 amounts were collected.[25] Another commenter asks

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[25] Texas Eastern Transmission Corporation (Texas Eastern) requested clarification, or in the alternative, rehearing of the

whether each customer's share of refunds may be based on sales during a representative period compared to total sales during that period. Similarly, commenters are apparently confused on the method for processing refunds received from other pipelines. Specifically, three commenters state that the Commission should clarify or prescribe standards for processing refunds received from other pipelines.

Some commenters argue that the Commission intended for pipelines to refund amounts received from other pipelines in lump sums within 15 days of receipt. One commenter suggests arriving at this result by defining funds received from downstream pipelines from another pipeline as within the definition of Btu refunds. Another commenter argues that second pipelines are not exempt from lump-sum refunds because the administrative burden is no greater than for first seller refunds. Another commenter asserts that the interim rule is silent on the proper manner to handle refunds received from other pipelines and argues that the PGA mechanism is the best method because it avoids the administrative hardship of continuous lump-sum refunds. In contrast, one commenter argues that using the PGA mechanism for refunds received from other pipelines is contrary to the Commission's goal of distributing refunds to those customers actually overcharged.

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interim rule (Docket No. RM84-6-002). Specifically, Texas Eastern asked whether the interim rule permits pipelines to spread the Btu refunds among customers based on each customer's *pro rata* share of purchases, for the period that significant amounts of Order No. 93-A dollars were included in the PGA. If the interim rule did not permit this approach, Texas Eastern requested that the Commission grant rehearing and issue rules in conformity with Texas Eastern's interpretation of the interim rule. Since Texas Eastern's interpretation is a permissible procedure for determining the refunds owed to its jurisdictional customers, the Commission is not treating its filing as a rehearing request. The specifics of Texas Eastern's proposed refund plan which was filed by Texas Eastern in Docket No. RP84-89-000 will be addressed by a separate order to be issued by the Commission in Docket No. RP84-89-000.

The Commission believes that a pipeline and its jurisdictional customers are in the best position to work out a procedure that 1) determines the portion of the aggregate amount of Btu refunds which are due a pipeline's jurisdictional customers actually overcharged based on the proportion of the total Btu refunds originally paid by those jurisdictional customers; and 2) refunds this amount to each jurisdictional customer in the same proportion that each jurisdictional customer originally paid the Btu refund amounts. For example, it may be appropriate for a pipeline to allocate the aggregate of all Btu refunds received from both first sellers and other pipelines based on each customer's purchases during the PGA periods in which Order No. 93 amounts were collected compared to the total sales during that period. Pipelines would then pay this refund to those customers in a lump-sum cash payment. In any event, pipelines are to process Btu refunds received from other pipelines in the same manner as Btu refunds received from first sellers because this procedure will return the Btu refund amounts to those customers actually overcharged.

Pipelines characterize the 15-day refund period as burdensome, unrealistically brief, impractical, intolerable, and an unreasonable burden. Other commenters argue that 15 days is insufficient time to verify, allocate and distribute the refunds. Commenters suggest several alternative payment schedules that provided longer refund periods. These schedules ranged from 20 days to 12 months.

The Commission is not persuaded by these comments. Fifteen days should be sufficient time to determine the proportion of the aggregate amount of the Btu refunds which are due the pipeline's jurisdictional customers actually overcharged based on the proportion of the total Btu refunds originally paid by those jurisdictional customers and to pay the necessary refund amount. Pipelines that meet this 15-day refund period will have use

of this money without reimbursing the rightful owner of the value of the use of these funds. Alternatively, pipelines may always take longer than the 15-day refund period (subject to a maximum 120-day holding period), but they must pay interest from the date of receipt until payment is made to its jurisdictional customers. The Commission believes the requirement that pipelines pay interest from the date of receipt until payment is made, if payment is not made within 15 days, fairly balances the competing interests of consumers and pipelines.

One commenter suggests that the rule permit pipelines to flow through the principle amount of any *de minimis* refunds without interest because the interest calculations are so complex. This rule does not adopt this suggestion. The Commission believes that it would be unfair to consumers to waive interest on *de minimis* amounts, since the Commission does not believe that these interest calculations will be overly burdensome on the pipelines.

Finally, while the Commission does not intend to treat pipelines as guarantors of refunds, the Commission urges the interstate pipelines to actively pursue any refunds owed by first sellers. The Commission believes that these pipelines have an obligation under the Natural Gas Act as part of prudent management to ensure that these refunds are paid promptly and properly.

B. *Refund Reports*

In addition to those refund reports described earlier, the interim rule requires interstate pipelines to file two additional reports describing the refund payments made to interstate pipeline customers by detailing 1) the actual amounts received, and 2) the total amount the interstate pipeline paid its customers and the basis used to apportion the Btu refund amount among those customers. These reports are due December 18, 1984, and July 3, 1985. These reporting requirements are necessary to en-

sure that all interstate pipeline customers have received their refunds. In addition, these reports will assist the Commission as well as the interstate pipeline customers in reviewing the refund payments.[26]

Commenters argue that the final rule should require refund reports from every person purchasing gas for resale in order to monitor the flow of refund monies and to assure that refunds have been properly and fairly allocated. In contrast, other commenters argue that reporting requirements should not be expanded to LDCs. In addition, one commenter argues that refund reports concerning customers should show the total amount paid each of the pipeline's customers and the interest due each of the customers as of the date of the report.

The Commission believes it can monitor the flow of Btu refunds without requiring reports from every person purchasing gas for resale. In addition, the Commission believes that the States are in a better position to monitor the LDCs. Hence, the Commission is adopting the interim rule reporting requirements with two modifications. First, the reporting requirements are modified to require that refund reports show the amounts of principal and interest paid. Second, the Commission is requiring an additional refund report from interstate pipelines because first sellers may defer payment of the Btu refund amounts attributable to royalty interest owners. This report is necessary to monitor the refund process to its completion. Thus, interstate pipelines must file refund reports by December 18, 1984, June 17, 1985, and January 5, 1987, detailing 1) the actual Btu refund amounts received by the pipeline and 2) the total Btu refund amounts that the interstate pipeline paid its jurisdictional customers and the basis used to apportion the

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[26] The authority to require these reports is section 501(a) of the NGPA. *See* n.23, *supra*.

refund amounts among those customers.[27] The Commission believes that this approach provides the Commission sufficient information to track the refund process without unduly interfering with the traditional jurisdiction of the States over retail sales of natural gas.

V. *Refunds at the State Level*

Although the Commission stresses its intention that refunds should reach the ultimate consumer, the interim rule only requires refunds as far as intrastate pipelines and interstate pipeline's jurisdictional customers.[28]

One commenter argues that the Commission has the authority and should exercise that authority to return refunds, subject to a rule of reason, to the consumers actually overcharged in the same proportion that those customers were overcharged. Another commenter argues that the absence of State rate regulation over the interstate pipelines' direct sale transactions underscores the need for the Commission to ensure that refunds are paid to direct sale end-users. Other commenters argue that, if States are allowed to determine the methods, procedures, and timing of refunds, there are no assurances that the ultimate consumer will benefit. Alternatively,

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[27] The last report is due 60 days after November 5, 1986. The second report is due by June 17, 1985, which is 45 days, instead of 60 days, from May 3, 1985, because the second report is no longer the final report.

[28] The Process Gas Consumers Group, the American Iron and Steel Institute, the Council of Industrial Boiler Owners, The Brick Institute of America, and Kimberly-Clark Corporation (Docket No. RM84-6-001) requested rehearing. Specifically, they requested that the Commission modify the interim rule, pursuant to the authority delegated in NGPA sections 501 and 504, to require that all Btu adjustment refunds be flowed through to end-users in the same proportion that such users were originally overcharged due to the implementation of the "dry" rule. The Commission denies their petition for rehearing for those reasons discussed in the text that follows.

commenters suggest that the Commission strongly advise the States or provide guidance to the States on how intrastate pipelines and LDCs should refund overcharges to the ultimate consumer. In contrast, commenters argue that the Commission lacks jurisdiction to order refunds by LDCs. Other commenters argue that refunds by LDCs are best left to State agencies.

While the Commission stresses that these Btu refunds should be passed through to the ultimate consumer, it has decided against establishing specific refund procedures for LDCs to flow through these refunds. States are better attuned to the needs of its consumers and to local market conditions, and are better equipped to establish and monitor the local refund procedures necessary for the different problems facing a particular State. In addition, establishing specific procedures to flow through refunds at the State level would unnecessarily and unreasonably interfere with the traditional jurisdiction of State commissions over retail sales of natural gas, while imposing significant administrative burdens on this Commission. The Commission has also decided not to establish refund procedures for refunding monies to an interstate pipelines' direct sale customers because it believes that these customers have sufficient direct contact with the pipeline to negotiate a refund schedule.

VI. *MISCELLANEOUS*

A. *Section 502(c) Adjustments*

Commenters note that while relief from provisions of this refund order is available under section 502(c) of the NGPA, the Commission should not view the theoretical possibility of this relief as a remedy for any special hardships or inequities which could result from this refund order, but rather, should amend the interim rule to remove such hardships or inequities.

The Commission has sought to implement a refund mechanism that will minimize hardships and inequities.

However, it recognizes that, given the amount of refunds and the extensive number of buyers and sellers involved in the refund process, hardships or inequities may occur. The Commission believes that section 502(c) will provide an appropriate mechanism to remedy any hardships and inequities, which may occur, on a case-by-case basis. Although the Commission may not use section 502(c) to change statutory requirements, such as the maximum lawful prices under the NGPA or to reduce the Btu refund amount owed, parties may seek relief under section 502(c) from provisions of these refund procedures which they believe cause special hardships, inequities, or an unfair distribution of burdens. However, the Commission expects few applications of this type and is not inclined to grant them unless the applicant's claim for relief is supported by compelling reasons.

B. *Identity of First Seller*

One commenter suggests that whenever there are two consecutive "first sales" or an accounting for gas for payment purposes after processing, any Btu refunds should be based on the *second* "first sale." Specifically, the one delivering the residue gas at the tailgate of the plant to the pipeline-purchaser should be responsible for the refunds because of the difficulty of tracing revenues from the wellhead. Another commenter asserts that the rule should be clarified to apply to every kind of "first sale."

The Commission recognizes that in some instances there may be a string of consecutive first sales because of gathering, processing, and transportation agreements. In these situations, the Commission has decided that the refund obligation applies to every kind of first sale, as a first sale is defined under the NGPA,[29] since the Commission has jurisdiction over all first sellers and it would be unfair to hold one first seller responsible for the re-

[29] *See* section 2(21) of the NGPA, 15 U.S.C. § 3301(21) (1982).

fund from a string of first sales. Hence, if the seller in a first sale receives revenues in excess of the product of the applicable maximum lawful price under the NGPA and the quantity of MMBtu's determined on the basis of the wet rule, a refund is owed.

VII. *PAPERWORK REDUCTION ACT*

The refund reports required under Ordering Paragraph Nos. E, F, and G and §§ 154.38(h)(3)(vi), (vii), and (viii) are information collection requirements that are being submitted to the Office of Management and Budget (OMB) for its approval under the Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520 (1982) and OMB's regulations, 5 C.F.R. Part 1320 (1984). Comments on these provisions should be sent to the Office of Information and Regulatory Affairs of OMB (Attention: Desk Officer for the Federal Energy Regulatory Commission). Interested persons can obtain information on the information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 (Attention: Joseph Hartsoe, (202) 357-8033).

VIII. *EFFECTIVE DATE*

The Commission incorporates the reasoning and findings in the interim rule that good cause exists under the Administrative Procedure Act (APA), 5 U.S.C. § 553(b) (1982), for finding that a notice of proposed rulemaking is unnecessary, impracticable and contrary to the public interest. Because this rule adopts and modifies the interim rule and the interim rule is already in effect, the Commission is concerned that, if this final rule were not effective upon issuance, first sellers and pipelines might apply the interim rule in a manner inconsistent with this final rule before this rule becomes effective. Therefore, the Commission finds that good cause exists under the APA, 5 U.S.C. § 553(d) (1982), to make this rule effective upon issuance, except for the requirements to file 6-month, 12-month, and 30-month refund reports. These

refund reports are information collection requirements under the Paperwork Reduction Act and are subject to OMB approval. Accordingly, the refund report requirements (set forth in Ordering Paragraph Nos. E, F, and G and §§ 154.38(h)(3)(vi), (vii), and (viii) of this rule) will become effective December 1, 1984. If OMB's approval and control number have not been received by this effective date, the Commission will issue a notice temporarily suspending the effective date of the refund reporting requirements.

IN CONSIDERATION OF THE FOREGOING, THE COMMISSION ORDERS:

(A) Any first seller that collected revenues in excess of the product of (a) the applicable maximum lawful price established by the NGPA, and (b) the quantities of MMBtu's determined on the basis of § 270.204, shall refund any such excess revenues. This refund shall be paid in full by November 5, 1984, unless the first seller is a small first seller, *i.e.*, a first seller that sold a total of ten mill Mcf or less of gas, in both the interstate and intrastate markets, during 1983. A small first seller shall pay the refunds in full by May 3, 1985, but must notify in writing any pipeline to which he owes refunds that he is a small first seller by November 5, 1984, to qualify for this extension. To the extent that revenues for gas sold in a first sale under the NGPA are less than or equal to the level of revenues based on the product of (a) and (b), and are contractually authorized, no refunds are due.

(B) First sellers may defer payment of that portion of the Btu refund attributable to royalty interest owners until the first seller receives payment from the royalty interest owner or November 5, 1986, whichever occurs first. Those first sellers that defer payment of that portion of the Btu refund attributable to royalty interest owners must notify pipelines that some royalty payments are deferred before the end of the applicable 6- or 12-month refund period.

(C) The parties to the first sale transaction may choose the method of payment of this refund except that pipelines and first sellers may not offset Btu refunds and production-related costs permitted under section 110 of the NGPA. Those pipelines that have already begun to collect refunds by using billing adjustments without the consent of the seller can continue this method of payment only if the seller agrees. If the parties cannot agree, payment shall be made in a lump-sum cash payment.

(D) Interest shall be calculated in accordance with §§ 154.102(c) and (d) of the Commission's regulations for refunds except that the interest obligation for money paid into escrow is that interest which accrued in the escrow account on the amount required to be refunded.

(E) By December 18, 1984, intrastate and interstate pipelines shall file a refund report with the Commission detailing (1) those first sellers that have made refunds, and the refund amounts that have been received by the pipeline by separately stating the principal and interest received from each first seller; and (2) those first sellers that have not make refunds, and the refund amounts that have not been received by the pipeline by separately stating the principal and interest due from each first seller, and the reasons for such nonreceipt. Of those first sellers who are small first sellers, as defined in this order, only those who have paid the refund amounts in full need to be identified. Intrastate pipelines shall also file a copy of the report with the State regulatory agency having jurisdiction over such pipeline.

(F) By June 17, 1985, intrastate and interstate pipelines shall file a refund report with the Commission detailing (1) those small first sellers not previously identified that have made refunds, and the refund amounts that have been received by the pipeline by separately stating the principal and interest received from each small first seller, and (2) those small first sellers that have not made refunds, and the refund amounts that have not been received by the pipeline by separately

stating the principal and interest due from each small first seller, and the reasons for such nonreceipt. Additionally, any payments received since the date of the pipeline's last report from other than small first sellers shall be included in this report by providing the information required in paragraph (E) above. Intrastate pipelines shall also file a copy of this report with the State regulatory agency having jurisdiction over such pipeline.

(G) By January 5, 1987, intrastate and interstate pipelines shall file a refund report with the Commission detailing 1) those first sellers that have made refunds after May 3, 1985, and the refund amounts received by the pipeline by separately stating the principal and interest received from each first sellers, and 2) those first sellers that have not made refunds, the refund amounts that have not been received by the pipeline by separately stating the principal and interest due from each first seller, and the reason for such nonreceipt. In addition, intrastate pipelines shall file a copy of this report with the State regulatory agency having jurisdiction over such pipeline.

List of Subjects

18 C.F.R. Part 154

Natural gas

(H) the regulations in Part 154, Subchapter E, Chapter I, Title 18, *Code of Federal Regulations* are amended as set forth below.

By the Commission.

Commissioner Richard dissented in part, with a separate statement to be issued later.

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

[SEAL]

1. The authority citation for Part 154 is revised to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. §§ 7101-7352 (1982); Executive Order 12,009, 3 C.F.R. 142 (1978); Administrative Procedure Act, 5 U.S.C. §§ 551-557 (1982); Natural Gas Act, 15 U.S.C. §§ 717-717w (1982); Federal Power Act, 16 U.S.C. §§ 791a-828c (1982); Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432 (1982); Public Utility Regulatory Policies Act, 16 U.S.C. §§ 2601-2645 (1982); Interstate Commerce Act, 49 U.S.C. §§ 1-27 (1976).

2. Section 154.38(h) is revised to read as follows:

§ 154.38 *Composition of rate schedule.*

* * * *

(h) *Pipeline recovery of the Btu Measurement Adjustments.*

(1) A pipeline which receives Btu refunds shall make refunds in accordance with the provisions of this paragraph, notwithstanding any pipeline tariff provisions to the contrary.

(2) For the purposes of this paragraph, "Btu refunds" means those monies held in escrow accounts and those monies received by the pipeline which are attributable to refunds and interest accrued thereon due in accordance with the August 9, 1983, Court of Appeals decision in *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1616 (1984).

(3) A pipeline subject to paragraph (h)(1) shall refund Btu refunds to those jurisdictional customers actually overcharged from December 1, 1978, in accordance with the following:

(i) The pipeline shall first determine the portion of the aggregate amount of the Btu refunds which are due

its jurisdictional customers actually overcharged based on the proportion of the total Btu refunds originally paid by those jurisdictional customers;

(ii) The pipeline shall then refund the amount determined in paragraph (h)(3)(i) to each jurisdictional customer actually overcharged in the same proportion that each jurisdictional customer originally paid the Btu refund amounts;

(iii) This refund shall be made in a lump-sum payment to each jurisdictional customer;

(iv) Interest shall be computed in accordance with § 154.67(c) of the Commission's regulations from the date of receipt from a first seller or supplying pipeline to the date the amount is disbursed to its jurisdictional customers, if a pipeline fails to refund the jurisdictional portion of the Btu refunds within 15 days after receipt from a first seller or supplying pipeline;

(v) The pipeline may defer the payment of the jurisdictional portion of any Btu refunds refunded to it until it has accumulated such Btu refunds which cumulatively equal one mill per Mcf (or Dkt) for the pipeline's annual sales during calendar year 1983, at which point the pipeline shall refund the jurisdictional portion of all Btu refunds received in accordance with paragraphs (h)(3)(i), (ii), and (iii) of this section. However, in no event may the pipeline hold such Btu refunds for a period greater than the earlier of 120 days from the date of receipt or 30 days after November 5, 1986. Such deferral shall be subject to the interest requirement in paragraph (h)(3)(iv) of this section;

(vi) The pipeline shall submit to the Commission no later than December 18, 1984, a refund report showing, for each source from which Btu refunds are obtained, the following information:

(A) The total amount of the Btu refunds the pipeline received;

(B) The total amount of interest the pipeline received;

(C) the date(s) the pipeline received the refund(s);

(D) The total amount the pipeline paid to each of its jurisdictional customers;

(E) The total amount of interest the pipeline paid to each of its jurisdictional customers;

(F) The date(s) of the payment(s);

(G) The basis used to determine the payment(s) for each of the pipeline's jurisdictional customers.

(vii) The pipeline shall submit, no later than June 17, 1985, a refund report describing, for each source from which Btu refunds are obtained, those refunds received or paid (including deferred amounts paid) since filing the report under paragraph (h)(3)(vi) of this section. For those refunds subject to this paragraph, this report should show all the information enumerated in paragraph (h)(3)(vi).

(viii) The pipeline shall submit, no later than January 5, 1987, a final refund report describing, for each source from which Btu refunds are obtained, those refunds received or paid (including deferred amounts paid) since filing the reports under paragraphs (h)(3)(vi) and (vii) of this section. For those refunds subject to this paragraph, this report should show all the information enumerated in paragraph (h)(3)(vi).

3. Section 154.102 is amended to make the amendment in the interim rule final by adding a new paragraph (d) to read as follows:

§ 154.102 *Suspended changes in rate schedules; motions to make effective at end of period of suspension; procedure.*

* * * *

(d) No interest is required to be paid on any portion of a refund which represents payments of royalties or taxes to Federal or State governmental authorities, except to the extent that such authorities pay interest to the first seller when refunding overpayments of royalties or taxes.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

October 22, 1984

Docket Nos. RM84-6-000,
RM84-6-001, and
RM84-6-002

REFUNDS RESULTING FROM BTU
MEASUREMENT ADJUSTMENTS

TO ALL PARTIES:

Attached is Commissioner Richard's statement to Order No. 399 issued September 20, 1984, in the above referenced proceeding.

/s/ Kenneth F. Plumb
KENNETH F. PLUMB,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Part 1534]

Docket Nos. RM84-6-000,
RM84-6-001, and
RM84-6-002

REFUNDS RESULTING FROM BTU
MEASUREMENT ADJUSTMENTS

(Issued October 22, 1984)

RICHARD, Commissioner, *dissenting* in part:

I agree with the Commission majority on this point: refunds are due. I strongly disagree, however, with the Commission's position that it has no option but to insure that every dollar paid under Order No. 93 and 93-A be returned to the consumer, even if those dollars must be subsidized by producers who never had their use. I also disagree with the refusal to offset section 110 allowances that are due and payable under Order No. 94, *et al.*

In *Interstate Natural Gas Association of America v. Federal Energy Regulatory Commission*, 716 F. 2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1616 (1984) (*INGAA*), the United States Court of Appeals for the District of Columbia Circuit vacated the Commission's regulations adopted in Order Nos. 93 and 93-A. The Court's opinion was silent, however, as to the question of refunds.

In considering the question of mandatory refunds, the Commission in its Final Rule refers to the maximum lawful ceiling prices established by the NGPA and to the provision in § 504(a) of the NGPA which makes it unlawful for any person to sell natural gas at a first sale

price in excess of any applicable maximum lawful price (MPL). The Commission reasons that:

> If the Commission did not make the measurement rule retroactive and did not require refunds, it would effectively be establishing a ceiling price higher than the maximum lawful prices prescribed in the NGPA. Since the NGPA does not contain any provision allowing the Commission to change the maximum lawful prices, except in very limited circumstances, it cannot waive the refund obligation.[1]

I have several problems with the Commission's analysis. First of all, § 504 of the NGPA gives the Commission permissive authority to pursue certain civil and criminal actions against people who are in violation, or about to be in violation, of the Natural Gas Policy Act. The Commission is allowed to pursue, in a civil action, injunctive or other equitable relief; it is given permission to transmit evidence to the Attorney General for consideration of criminal action; and, finally, the Commission is given the option of imposing a penalty of not more than $5,000 per violation on anyone who *knowingly* violates any provision of the Natural Gas Policy Act.[2] It would seem that the edict in § 504(a) declaring a first sale in excess of the maximum lawful price unlawful is a vehicle for establishing an array of remedies which the Commission is then allowed to pursue if it chooses. The Commission seems to interpret this section as a demand for strict compliance without *any* discretion at all. I disagree.

The argument that the Commission's failure to recover all of the principal dollars involved in this refund obligation constitutes a *de facto* sanction of prices in excess of the NGPA maximum lawful price entails a leap of logic that is not dictated by the statute. It is misguided to

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[1] 28 FERC ¶ 61,379.

[2] § 504, Natural Gas Policy Act of 1978.

assume that, should the Commission be unable to enforce the collection of every cent exchanged under the BTU Rule, the Commission is actively or implicitly sanctioning prices in excess of the MLP. Certainly, for purposes of resolving contract disputes over price, no party should expect to argue successfully that the Commission had raised the statutory ceiling prices applicable over this period of time. In fact, by virtue of ordering refunds at all, the Commission recognizes that collections under the vacated rule were in excess of the maximum lawful price.

The Commission should order refunds. However, I believe we should consider the policy implications of our decision in the context of other Commission final rules with an eye toward easing the transition into the more decontrolled environment after January 1, 1985.

Although admonished at our meeting that the *Consumer Federal of America v. FPC*,[3] arose under the Natural Gas Act, the Court's language on the subject of refunds does give, I feel, this Commission guidance as to our policy parameters on refunds.

> We express no opinion on the refund issue, beyond saying that, in our view, it involves complex and difficult questions which must be presented to and addressed by the Commission in the first instance. In matters of prospective and retroactive effect, *there are large questions of equity and public interest—both for agencies and for courts. While full refund under an invalid order is a sound basic rule, it may be offset, at least in part, by the lack of a mechanism to restore the full status quo ante*, the fact that consumers may have had the benefit of some increase in supply that would not have been forthcoming under Section 7 procedures, albeit purchased at an excessive price . . . .[4] [Emphasis added.]

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[3] 515 F.2d 347 (D.C. Cir. 1975).

[4] *Id.* at 359.

Unlike the majority however, I would suggest alternative ways to deal with the refunds that I believe would better balance our total responsibility under both the Natural Gas Act and the Natural Gas Policy Act's strictures of providing consumers the least cost reliable supply.

OFFSETS WITH ORDER 94 COSTS

Several commentors proposed that the Commission permit producers to be able to require an offset of any BTU refunds against monies owed them for production-related cost reimbursements pursuant to Order No. 94, *et al.*[5] Commentors argue that such an offset would mitigate against many of the financial difficulties imposed upon producers by the refund rule.[6]

I believe from a policy perspective the recommendation is a good one. In fact, production-related costs were collected during roughly the same time period. In many cases, there is a symmetry of parties with regard to payments owing under Order Nos. 93 and 93-A and Order Nos. 94, *et al.* It would seem that where such symmetry[7] exists, and the pipeline and producer can agree, an offset would be an equitable and efficient means of effecting the exchange of money owed. Because of the short lengths of the refund periods and the long period of time over which these payments were made, it would behoove the Commission to recognize[8] that, from an equity perspective, an offset would give producers a chance to offset lawfully owed money with a lawfully compelled refund.

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[5] *See e.g.* Comments of Indicated Producers, Pennsylvania Natural Gas Associates, and Tennessee Gas Pipeline. All comments are to the Interim Rule.

[6] *See e.g.* Comments of Panhandle Eastern/Trunkline and TIPRO.

[7] *See e.g.* Comments of Panhandle Eastern, Trunkline, and Tennessee Gas Pipeline.

[8] Production-related costs were finally allowed by this Commission five years after passage of the NGPA.

Although offsets other than Order No. 94 amounts were suggested,[9] I would recommend at a minimum only these costs because their size and existence are relatively easy to ascertain.

Would pipelines with Btu refunds bargain less aggressively with producers trying to collect production-related costs if offsets are allowed? I think they would be foolish to do so from a competitive and a regulatory perspective.

The Commission in implementing its statutory duty under Section 110 carefully, through a series of orders, allowed only certain cost-justified amounts to be collected from pipelines and their customers.

Essentially, the Order 94 series requires that, before a producer may collect production-related costs, express contractual authority must be present. This assumes the activity is in fact being performed and that only amounts necessary to recover the costs are collected. In the case of compression and gathering amounts, to insure the statutory requirement is met, the Commission developed limits on the amounts producers can charge based on studies of these costs.[10]

In its Interim Regulations, the Commission ordered that individual application be made for production-related costs. To remove this burden and to remove unwarranted delay in sellers receiving adjustments under Section 110, the Commission allowed a self-implementing scheme.

However, to protect purchasers and "mindful of the potential for abuse inherent in any self-implementing regulatory scheme," the Commission warned that field audits will ensure sellers adhere to the rules.[11]

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[9] *See* Comments by TIPRO, pages 3-5 ". . . existing contract or existing state law governing such contract, permits . . . the offset."

[10] Order No. 94-A.

[11] *Id.* at 44. The Commission, to avoid any misunderstanding as to its enforcement authority, stressed that the collection of an

Also, the Commission imposed a general record retention requirement on sellers to identify the amount collected and demonstrate the basis of the collection. Sellers must provide gas purchasers with a description of the charges a reasonable amount of time before charging for the production-related services so that they may determine whether these charges are consistent with our regulations and are contractually authorized.

The Rule was specific. "A typical transaction under the rule will consist of: The parties' determination of express contractual authorization, performance of the service, submission of a description of charges, billing for the charges, and collection of payments." [12] If the purchaser disputes the charges, he may ask the seller to validate the proposed charges *before* making payment.[13] The written description must show by well or by completion location the adjustment by amount and type of production related service.[14]

The Commission noted that an interstate pipeline must be able to explain and justify its section 110 payments.[15]

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amount not so authorized would be a statutory pricing violation with potential civil and criminal penalties under Sections 504(b)(6). *See also* Order No. 94-A at 98-99.

The Commission also established a "Production-Related Costs Board that focused *primarily* on the obligation of *sellers* to justify any Section 110 allowance in response to staff audits. . . ." A procedure is also set up to resolve disputes on the amount of refunds that may be due if the seller collected unauthorized amounts. A complaint filed pursuant to § 385.206 can activate the Board if an allowance is thought to be charged, collected or otherwise not paid in violation 18 C.F.R. § 271.1104. Any person or party can so file. The Commission may refer to the Board allowances raised by a protestor to a PGA proceeding. *See* generally Federal Stat. & Reg. Preambles at 30,663-664.

[12] *Id.* at 54-55.

[13] *Id.* at 56.

[14] Section 271.1104(f).

[15] Order No. 94-A at 58.

"To prevent any large scale economic dislocations that may result from any one seller or group of sellers attempting to recover the allowances for prior costs in one lump sum or a few large payments," Order 94-A provided that the amounts be collected over the time the Rehearing Order became effective (March 7, 1983) and ending December, 1984.[16] This period was selected because of the impending NGPA decontrol of certain categories of natural gas on January 1, 1985. Since on January 24, 1983, the impact of decontrol on the collection of generic allowances was uncertain, the collections were to be made "under a schedule of payments that ensure[d], as nearly as possible, that the amounts would be paid in equal installments." [17]

It is clear from the public hearing that these transactions between all pipelines and all eligible producers were not on schedule by at least the time of our final rule.[18]

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[16] *Id.* at 92.

[17] *Id.* at 92-93.

[18] Tr. 46, 86, 92, 117-119, 125-126. With the refund obligation and no offset, one commentator, Union Oil of California noted:

> [T]he producer is being forced to pay both Btu refunds plus interest and absorb pipeline nonpayment of production related costs plus interest. In essence, the producer must shoulder two debts and pay twice.

at 5.

Producers have the option of pursuing their contract rights at law in order to collect the costs owed to them and/or to engage in settlement negotiations with the pipelines over the issue of what costs are owed. Arguments are raised that, because of current market conditions, any amounts resulting from such negotiations or litigation resulting in production-related costs being paid to the producer would likely be paid by pipeline shareholders rather than consumers. Specifically, the argument is that the marketplace would not bear the increase in price at the burner tip which would result from the inclusion of these costs. If that were the case, the

The reason for tardiness is unclear but it is reasonable to assume that some pipelines are carefully reviewing the claimed costs (as they should). I appreciate that no

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pipeline shareholders would have to pay the costs themselves or lose markets.

If the Commission, on the other hand, allows Btu refunds to be offset by production-related costs, it is not the shareholders who would bear the costs but rather the consumers. As a matter of equity, then, the question is whether the offset procedure would work to the detriment of consumers. In response, it is important to note that the production-related costs here are costs which have actually been incurred for past periods and which, under the contracts, are owed to producers. Consumers have had the benefit of the services that caused the costs, and, *where contractual authority exists*, and subject to our other conditions, consumers owe the costs.

If those costs are paid by the customers through an offset, they are not being penalized by the procedure—rather, they are paying what they rightfully owe in an efficient way (which, incidentally, will have little effect on the price of gas for which they are currently paying).

To the extent market restraints exist and shareholders must subsidize production related costs which occur either outside of or over and above the offset, consumers have only rightfully been compensated for their pipelines' unfortunate market position. Either way, it would seem that the rights of the consumers are being carefully protected.

In addition, when addressing issues concerning market responsive prices, it is important to note that the "market price" ought to reflect in a relatively pure sense what the cost of gas is. The elimination of variable costs from minimum bills is an attempt to expose, (in all of its nakedness) the cost of gas on each pipeline system. Many adjustments to the actual wellhead cost of gas get included in PGAs and, therefore, the "cost of gas" represented in a PGA filing may not reflect the average cost of gas at the wellhead in a pure sense. Current production related costs, are appropriate in that they do reflect the current actual cost of gas. Faced with impending partial wellhead deregulation, it may well behoove the Commission to examine the PGA mechanism as we did with the Minimum Bill Rule, and its permissible components of gas costs to determine whether artifacts of the current procedure confuse wellhead price signals.

one in business (especially with able counsel representing local distribution companies and with state commissions' counsel and us carefully reviewing the costs,) would pay any unauthorized amounts. As discussed, our rules carefully circumscribe the ability to do this. In the same vein able counsel representing producer interests don't want to pay above legally correct refund amounts.

The Commission has set the parameters of the amounts on *both*. It surely would be more in the public interest to allow both parties with differing economic interests to settle out these respective amounts (Btu refunds and 94 costs) as much as possible prior to January 1, 1985. The pipelines interest would be to seek the largest Btu refund and the lowest production-related cost exposure. (The offset would probably do away with much of the necessity for extended periods of refund.) Purchasers would pay no more than the MLP since the offset will not reduce the net refund obligation imposed on producers since purchasers will still receive the full refund with interest to which they are entitled less amounts owed by the purchasers to producers.[19]

Our monitoring of both should not be impeded. In fact, I think it would help. As the Indicated Producers note:

> Any offset would require the producers and pipelines to separately calculate the amount of Btu refunds and the amount of production related expenses owed.[20]

For the same reasons why all parties, including us, want a clear identification of claimed production allowances, the producers in dealing with refunds should have the same authority. Producers need to be able to examine invoices for gas delivered and billed in order to be

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[19] Comments, Pennsylvania Natural Gas Associates, at 5.

[20] Supplemental Comments at 8.

able to reach an agreement with their pipelines about the exact dollar amount owed under the refund rule.[21] The evidence from the comments suggests that the practice of invoicing is not uniform across the industry. While it is most common for pipelines to supply the invoice, it is also the case that, on occasion, producers are responsible for providing the invoice. It would seem reasonable that the Commission require the party which has been historically responsible for billing to provide invoices for the purpose of documenting the exact amount of the refund owed.

The Commission concerned with this same problem in the Order 94 series, noted:

> . . . that inclusion in the description of charges of the amount per MMBtu to be charged, the specified service for which the charge is to be made, and the contractual provisions expressly authorizing the charges should give the purchaser sufficient information to review the anticipated charge.[22]

I agree with the Associated Distributors Group that the use of a lump sum refund rather than the PGA flow through mechanism would "strik[e] a balance between administrative simplicity on one hand and the more important considerations of refunding overcharges to those who actually paid them, avoiding disruption of inter-pipeline market competition. . . ." [23] I disagree, however,

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[21] Some pipelines have been laudable in this respect. *See* form sent to Producers by Natural Gas Pipeline contained in their comments.

[22] Order No. 94-C. *Id.* at 59.

[23] Comments at 1. Although the Commission has decided not to enforce this procedure at the state level and defer to those Commissions' expertise, the AGD arguments to return the amounts to those actually charged should be equally applicable at the State level. *See* Comments of Process Gas Consumers Group at 16-26. For their own administrative convenience purposes the State Com-

that the persons responsible for the production-related costs should not also bear responsibility for them at this time.

Flowing through all production related costs via future PGAs, absent an offset with Btu refunds, according to Panhandle/Trunkline raises:

> . . . the same question as to present customers that caused the Commission to conclude those customers should not receive the Btu overcharge refunds: current customers are not responsible for the past purchases on which the retroactive allowances are based.
>
> Requiring current rates to reflect the entire cost of the retroactive allowances would also create a massive disruption of the current natural gas market. In the Interim Rule, the Commission justified its decision to require direct pipeline refunds to past customers in part to avoid disrupting the cur-

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mission might consider the procedure PGC recommends for the distribution of whatever pool of refunds are received.

The use of the PGA to flow through refunds are certainly not inherently evil. But they can be used to send wrong signals as to purchased gas prices if used improperly.

"The Tennessee refund to Midwestern should be flowed through in accordance with Midwestern's tariff—in its PGA filing due to be effective January 1, 1985—and used to buffer the impact of projected increased gas costs on Midwestern's customers . . . ." Motion to Intervene and Protest of Northern Illinois Gas Company, Docket No. TA84-2-5-000. In the matter of Midwestern Gas Transmission Co. at 5. *See also* Motion to Intervene by Natural Gas Pipeline Company of America in the same proceeding (arguing for lump sum refund). Natural's pleading correctly pointed out:

> . . . competing pipelines are placed at a competitive disadvantage through manipulative rate-making, a factor which should not play a role in the gas-to-gas competition the Commission seeks to promote as indicated in the [Minimum Bill Rule, now final]." at 6.

See also Notice of Inquiry in Docket No. RM84-12-000, "Revisions to PGA Regulations", at 11-13.

rent market which the Commission feared could result from crediting refunds to current gas costs. Certainly, the opposite, but adverse impact of imposing the full burden of retroactive allowances on current pipeline ratepayers, while assigning the corresponding Btu refunds to past customers, would be far more disruptive.[24]

SUBSTANTIAL COMPLIANCE

After the offsets are made I think the Commission should have recognized in its order that only substantial compliance as to some refunds may be possible.

The Final Rule holds the first seller liable for all refunds. However, certain first sellers and royalty owners may be bankrupt, dead, etc., and the refunds they owe may not practically be recoverable from those persons. Since the Final Rule does place the ultimate liability for refunds which cannot be collected on the first seller (pipelines are not guarantors and our jurisdiction does not reach royalty owners), the Commission, as a policy matter, must consider whether, under carefully circumscribed circumstances, refunds should be excused.[25]

In the case at hand, there is absolutely no culpability present on the part of *any* party. All parties acted pursuant to a final Commission rule. Although first sellers may have relied upon the receipt of payments under the orders when making their investment decisions for the future, the maximum lawful price argument is accurate

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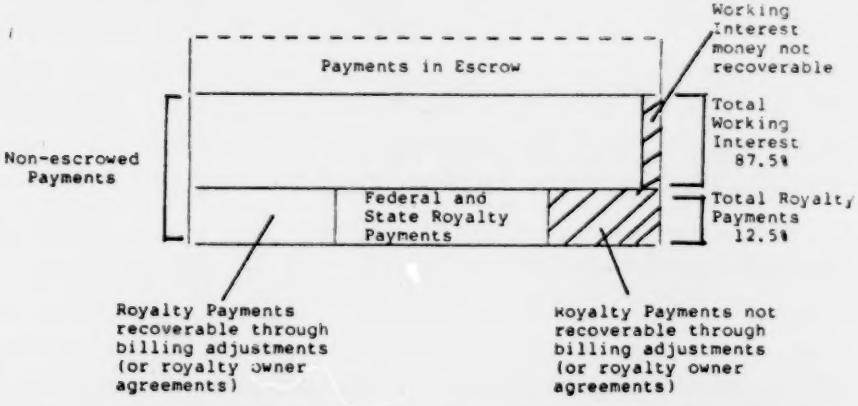
[24] Comments of Panhandle/Trunkline.

[25] Indeed, in the Final Rule, the Commission is silent as to the question of liability when an operator is dead, bankrupt or otherwise impossible to locate or collect from. The Commission does not require the pipeline, in such a case, to pursue the operator. Unless the Commission intends to pursue this operator itself, the associated refund will not be collected and the Commission is in a substantial compliance posture with respect to effecting refunds.

and dictates that consumers should receive refunds. However, in this case, the right to refunds (absent the netting out of due and payable costs discussed supra) should not extend so far as to justify the imposition of extraordinary burdens of collection or reimbursement on the first seller under all circumstances. The extent of ordered refunds should be balanced against the costs of making the refunds; and the refund process should be accomplished with at the least, a manageable amount of trauma to the industry.

Therefore, it seems to me, the Commission should face the question whether, as a matter of equity, some portion of the refunds that is uncollectible should be excused up front, and if so, how that portion should be defined.

The following diagram reflects my understanding of the components of the refund corpus:



Some portion of the Order Nos. 93 and 93-A payments was placed into escrow. The Commission does not know the aggregate amount of the refunds which was placed into escrow accounts. These amounts, however, are fully recoverable.

Of the remaining non-escrowed dollars to be refunded, roughly 87.5 percent are working interest dollars. Those dollars came to rest in the hands of the working interest owners and presumably have been used by the working

interest owners for the amount of time held. To that extent, it seems reasonable that generally working interest owners should be held liable for the refund of working interest dollars.

The Final Rule holds the operator ultimately liable for all refunds (both working interest and royalty) due during the time of his operation where he was responsible for collecting and disbursing revenues. (Operators do not *necessarily* own a working interest in the wells they operate.) The Commission agreed that, to the extent, operators change and working interests are assigned to others, the operator is only responsible for refunds during his operation period, except as provided otherwise by contract, deed or lease.[26] Whether some of these amounts are uncollectible regarding the following discussion and should fall under an exception proceeding is not as clear.

For example, except for the refunds attributable to any working interest owned by the operator, the operator never had the use of the money. If working interest owners and royalty owners are still participating in a well, the operator may be able to collect the money relatively easily through billing adjustments. But, if the working interest owners are difficult or impossible to locate, the operator must pay that portion of the refund and any costs associated with attempting to collect it out of his own pocket.

The remaining 12.5 percent of non-escrowed payments represents money paid to royalty owners under contracts.

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[26] The final Rule does not address the issue of split stream liability. Presumably, and rightfully, the operator's liability ought to extend only to the refunds attached to the portion of the well he is responsible for marketing, i.e., a first sale under his contract with interest owners. Therefore, if a portion of the stream is sold to a buyer under a separate contract under which the operator is not assigned marketing responsibilities, the operator would not be liable for The Commission's refunds owned on that portion of the stream.

First sellers never had the use of this money. First sellers simply, under the contracts with royalty owners, disbursed these dollars on a periodic basis. There are perhaps two-million royalty owners in this country.[27] It is likely that many of these royalty owners will be very difficult or impossible to locate due to death, bankruptcy, changes of title, well depletions, etc. Evidence was presented this concern is not theoretical.[28]

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[27] Tr. at 75.

[28] Comments of Clayton W. Williams Jr., Co., note the complexity:

> [S]ince the passage of the NGPA there have been changes in the ownership interests and royalty interests for untold thousands of wells. These changes have occurred as a result of sales, assignments, bankruptcies, and many other reasons. For example, Williams sold 148 wells in 1982. Of these 148 wells, [it] operated 112 and owned an interest in the remaining 36. When sold, there were 2,295 royalty interest owners . . . it no longer receives the revenues from these wells, [and has] no practical method of recovering the alleged overpayments from these 2,295 interest owners. [It] cannot deduct or withhold payment from royalty payments since [it] no longer receives the revenue from the wells . . . [and] would have to rely on the voluntary payment by these interest owners or resort to litigation in an effort to recoup these monies. Further, it is not clear whether royalty owners would even be obligated to make refund payments, or pay interest on such refunds, under existing state laws. To now require Williams to refund this money to the purchasers with little or no opportunity to recoup same from the royalty owners would be unfair and unjust.
>
> To illustrate the complexity of the data gathering problem, Williams currently [sic] administers 269 wells for which it makes full distribution of proceeds. [It] is averaging ten changes in royalty interest owners per week due to deaths, assignments, property sales, etc.
>
> Further, in the Austin Chalk area alone, from November 1979 to the present, Williams, *as operator*, drilled a total of 265 wells. Of these 265 wells, 112 were sold. Of the remaining 153 wells, 97 are still producing and 56 have been plugged and abandoned. Williams has also participated as a joint adventurer in an additional 184 wells in the area. Of these 184 wells, 36 were sold, 27 have been plugged and abandoned, leaving 121

The Commission's jurisdiction begins at the first seller under the Natural Gas Policy Act. The Commission has no jurisdiction over royalty owners. Since the Commission interprets its duty to enforce the maximum lawful ceiling prices under the NGPA as absolute, the Commission perceives that it must hold *someone* responsible for all of the dollars paid under Order Nos. 93 and 93-A. The Commission, accordingly, finds it necessary to require first sellers to refund not only the working interest money which they used but also all of the dollars which they paid to royalty interest owners over the period of time in question. The Commission, I feel, should heed first sellers' concerns that they may be unable to collect money from royalty owners or that the costs of collection may far outweigh the refund sought.

Although the Commission has rightfully ordered that refunds be made, the strict legal view taken here, that it must force liability for all refunds on parties within the bounds of its jurisdiction does not match the reality that not all the dollars remained in the hands of parties within our jurisdictional bounds. The unlawful benefit has come to rest in the hands of an entity which is non-jurisdictional.

The Commission should enforce recovery of dollars held by first sellers and simply recognize that dollars paid to royalty owners are owed to consumers. The Commission could impose an obligation on first sellers to recover dollars paid to royalty owners where the collection process is facilitated by the opportunity to make billing adjust-

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currently producing. Therefore, out of a total of 449 wells operated by or participated in by Williams, 231 have been sold or plugged and abandoned, thereby preventing Williams from having an effective means of recoupment for any overpayments to other interest owners in these wells. These sold and plugged and abandoned wells account for 51.5 percent of the total wells in which Williams had an interest.

at 4 and 5.

ments to future royalty payments. Of the 12.5 percent of non-escrowed Btu payments which were paid to royalty owners under contracts, some amount, presumably larger than half, is comprised of gas that is currently flowing and is associated with a contract such that the producer-operator may easily and lawfully recover the refund principal and interest by this method.

Absent this type of billing adjustments, we should provide a mechanism for first sellers who can't collect payments. The first seller in charging the Btu adjusted amount, acted pursuant to a Final Rule of this Commission. Monies paid to the royalty owners presumably were so paid under contracts in existence prior to the effective date of the rule. Those contracts do not for the most part allow producers discretion as to the amount and timing of royalty payments. Most often, the withholding of some portion of a royalty payment subjects the producer or operator to cancellation of the lease by the royalty owner. It seems reasonable then to assume that producers or operators may not even have had the option of unilaterally placing funds in escrow. At any rate, the payments were flowed through to royalty owners, placing the producer or operator in the role of a mere conduit. I feel that we do not have an issue of culpability here which would justify imposing the onerous and essentially punitive burden of pursuing lengthy and costly remedies on the producer or operator if the amounts are not recoverable through agreement or billing adjustment.

The majority on this issue in support of its decision to "not chang[e] the requirement that first sellers are responsible for the entire Btu refund" cite two Court of Appeals cases for the proposition that "the Commission has also held single parties responsible for all refunds in other circumstances under the NGA," [29] *Tenneco Oil Company v. FPC*, 442 F.2d 489 (5th Cir. 1971); and *Sauder v. DOE*, 648 F.2d 1341 (Temp. Emer. Ct. of App. 1981).

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[29] Order No. 399, at 25.

The *Sauder* case was not a Commission case under the NGA. In fact, the case represented one where a sole operator of an oil lease had been the animating force behind the continued production of an oil pool that had *certified* to an oil company buyer that the subject well was a stripper oil well subject to price control exemptions. The DOE issued a Notice of Probable Violation that he had *overcharged* the buyer; and later a remedial order that he had violated price controls and existing regulations.

No charge of violating or misinterpreting pricing regulations by producers are present here. Instead it was *our* final Btu rule that was later determined to be invalid.

As to restitution, the Court noted:

> Significantly, it was Sauder who certified . . . that the output of the leases was stripper well oil subject to the exemption. It can fairly be said that it was he who caused the overcharges. In these circumstances, we think that it is within the authority and discretion of the agency to hold the owner-operator of a lease liable for the full amount of the overcharge.[30]

Id. at 1348-49.

The Court in the *Tennessee* case noted the certificate holder should bear the refund responsibility, by fixing financial responsibility on some party, it made administrative sense. They noted the risk must fall on someone.[31] I agree.

I also agree with the discussion by the Federal Power Commission in the *Sinclair Oil* case that all producers

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[30] *Sauder v. DOE*, 698 F.2d 1341, 1347-48 (Temp. Emer. Ct. of Appeals 1981).

[31] *Tennessee Oil Company v. FPC*, 442 F.2d 489, 497 (5th Cir. 1971).

should be on notice in temporary certificates, absent notice to the contrary, that when refunds are ordered the holder of the certificate will be fully responsible and thus he should make "necessary arrangements for equitable sharing of responsibilities with other working interest holders. If he fails to do so, *this will not constitute a ground for releasing him from full responsibility.*" [32] [Emphasis supplied.] *Sinclair* was quoted and discussed at length by the Court in *Tennessee.*[33]

In the *Tennessee* case, however, the Court also noted the Commission's clear understanding that the certificate holder retained a right of recoupment against the co-owners who as a matter of equity should be primarily responsible for refunds of the excess amounts *actually received by them.*[34] On rehearing in *Sinclair,* the Commission noted that in the event of hardship the "co-owner may apply for an order permitting payment . . . of all or part of its share of the gas being produced to Sinclair until the co-owner's refund obligation has been satisfied." [35] 40 FPC 1279, 1280.

The Court also noted an exception to this obligation in "the situation which arises when the certificate holder has so many co-owners that the liability of *each* for refunds is so small that the cost of recoupment would exceed the amount due from the co-owners." [36]

I agree that someone should be held responsible. I also believe in the principles of the Tennessee case that the

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[32] *Sinclair Oil and Gas Company, et al.,* Opinion No. 545, 40 FPC 410, 419 (September 10, 1968).

[33] *Tennessee Oil Company v. FPC,* 442 F.2d 489, 494-6 (5th Cir. 1971).

[34] *Id.* at 495.

[35] *Sinclair Oil and Gas Company, et al.,* Opinion No. 595-A, 40 FPC 1279, 1281 (November 8, 1968).

[36] *Tennessee Oil Company v. FPC,* 442 F.2d 489, 495.

first seller make some *actual attempt* to find those persons from whom it seeks recoupment; abstract hardships or theoretical inequities are insufficient to escape liability before waiver. I would combine this principle with a *de minimus* rule and some advance waiver of refund liability under NGPA § 502(c) to those first sellers who are unable reasonably to recoup funds.

The Final Rule allows first sellers to defer royalty payments for two years pending collection. At the end of the two-year period, the first seller may ask for a further extension of time in the form of a § 502(c) adjustment. In my opinion, this is an unacceptable process for a number of reasons. First of all, under the Commission's strict interpretation of its duty to enforce the maximum lawful price, it may not, even at the end of two years or some longer period of time, waive the obligation to repay principal on the royalty payments. The first seller remains liable. During the deferral period, interest under the Rule continues to accrue at the prime rate. The debt remains a part of the first seller's overall financial profile and will obviously affect his future financial arrangements. The Rule encourages first sellers to expend funds pursuing whatever litigation or collection options he may have. As indicated earlier, this is not necessarily a cost-effective method of effecting refunds.[37] The money that the producers expend pursuing these royalty owners may well better benefit the consumer were it placed in the production stream. It would seem reasonable to take a much more upfront approach toward the responsibilities of first sellers for refunds under the Rule.

I would like to offer a proposal which, I believe, based on the comments in the record, reasonably balances the

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[37] Incidentally, the § 502(c) application fee, as set by this Commission, is $6,000. We would be asking the producer to spend $6,000 in order to apply for an extension of time to make a payment which is ultimately never recoverable.

equities. First of all, I would net out refunds and Order 94 costs as discussed supra. Second, first sellers would be liable only for working interest dollars and for royalty payments which are currently tied to an ongoing relationship between the first sellers and the royalty owner and working interest owners such that the amounts due can be recovered through future billing adjustments.[38] The money collected through billing adjustments would be escrowed and given to the pipeline at a specified time in a lump sum at the interest collected by the escrow account.[39]

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[38] If a working interest owner is *not* marketing his gas through an operator pursuant to a contract, then the working interest owner would himself be a first seller.

[39] Some portion of the 12.5 percent non-escrowed royalty payments was paid to state and Federal royalty owners. State and Federal royalty payments should be passed on by producers when the Government at issue returns the money paid to them along with the interest rate, if any, paid by the Government entity. Producers cannot lawfully retain portions of royalties paid to the Federal Government. One state, Wyoming, has already indicated that it will not return any overpayments, and that it will cancel the lease of anyone who withholds portions of future royalty payments. (Comments by Wexpro Company note at 3.)

It's interesting what data another government agency requires as to verification—much more than what producers requested they receive from pipelines. According to Wexpro:

> The procedures involve a two-step process of (1) verification of the validity of the refund claim, and (2) subsequent actual adjustment of refund amounts from future revenue settlements.
>
> The Mineral Management Service is requiring producers to provide the following supports: Schedule by production month of original royalty paid to Minerals Management Service, royalty which should have been paid and overpayment amount; Schedule by production month showing lease and well name, original calculation of royalties attributable to Minerals Management Service including adjustments and corrections, and the calculation of the correct royalty. In addition to the foregoing, the schedules should provide the following information: Category of gas/N.G.P.A. Section, gas volumes and pressure base, B.T.U. for reported pressure base, water vapor

In the event that a first seller is unable to recover royalty payments through a billing adjustment, the first seller would be required to file with the Commission an affidavit stating the name of the royalty owner, the amount of money owed by the royalty owner, and the reason why the money cannot be recovered. Absent protest, the Commission would grant waiver of the principal and interest obligation described in the affadavit in the event that the royalty owner is dead, bankrupt or involved in bankruptcy proceedings, the well on which the royalties were collected is dry and no other flowing well exists under contract between the two parties against which the refunds may be collected, or some other circumstances exists which would render the collection impossible absent costly proceedings.

My proposed changes are close calls. I recognize that arguments can be made on both sides and my colleagues are exercising their sincere judgment as to the Final Rule.

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content used in calculation, calculation of gas prices, royalty value of gas, royalty rate, royalty paid/due Minerals Management Service, date royalty paid, net royalty overpayment.

The adjustment process will be so time consuming as to create cash flow problems for the producer complying with the interim rule. (The MMS implies that refunds will be considered only if such refunds were previously reimbursed to the pipeline purchasers.) After the required documentation is submitted, the Service will review the data and, if approved, the producer will be required to resubmit the information on Form 2014 for the period covered by the period.

Producers note they are being placed in the role of an involuntary banker over an agency over which they have no control and with absolutely no authority to determine or dictate the repayment terms of their loan. (Tr. at 121). We should require, with our help, due diligence in collecting these amounts without the incurrence of accruing interest. The Commission Staff is to communicate with the Interior Department on this issue.

However, in closing, I note we should order refunds but be mindful that:

> [I]t should be clear that operators will bear a hugely disproportionate share of the refund burden, unless one is naive enough to think that, for example, Mr. Royalty in Florida is going to pay a bill for $34 that he receives from some oil company in Texas relating to a well that was plugged two years ago. How to then funnel this money through the labyrinth of the pipeline companies and into the hands of each ultimate gas consumer in just the right proportion is a task at which all but the hardiest bureaucrat would blanch in horror . . . .
>
> It is our hope (which springs eternal) that the Commission will note the manifest practical difficulties and equities with a retroactive refund rule and take this opportunity to demonstrate that at least one governmental body is able to weigh a marginal social benefit against an economic and regulatory nightmare and make the right decision.[40]

I believe the right decision can be one that results in substantial compliance of refunds returned, in this case with an offsetting of rightfully owed Order 94 costs. Thus, this and other measures taken and to be taken will aid us in assuring a correct answer to what everyone agrees will be the great social question of 1985—will decontrol under the NGPA work? I think it will—with enlightened regulation.

/s/ Oliver G. Richard III
OLIVER G. RICHARD III
Commissioner

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[40] Comment, Sage Energy Company at 2-3.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[18 C.F.R. Part 154]

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A.G. Sousa, Oliver G. Richard III and Charles G. Stalon.

Docket Nos. RM84-6-003
through RM84-6-014

REFUND RESULTING FROM BTU MEASUREMENT ADJUSTMENT

ORDER NO. 399-A

ORDER GRANTING IN PART AND DENYING IN PART REHEARING

(Issued November 20, 1984)

I. *INTRODUCTION*

The Federal Energy Regulatory Commission (Commission) is granting rehearing of Order No. 399,[1] which implemented *Interstate Natural Gas Association of America* v. *Federal Energy Regulatory Commission* (*INGAA*).[2] The Commission received eleven petitions for rehearing.[3]

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[1] 49 Fed. Reg. 37,735 (Sept. 26, 1984) (issued Sept. 20, 1984).

[2] 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1616 (1984).

[3] Petitions were filed by the Producers (Mobil Oil Corp., *et al.*), Consolidated Gas Transmission Corp., Kerr-McGee Corp., Panhandle Eastern Pipeline Co. and Trunkline Gas Co. (filing jointly), Mesa Petroleum Co., Pogo Producing Co., Tennessee Gas Pipeline Co. (a division of Tenneco, Inc.), Southern California Gas Co. and Pacific Lighting Gas Supply Co. (filing jointly), Pitts Oil Co., Sage Energy Co. and Clayton W. Williams, Jr., Co. (filing jointly), Mississippi Chemical Corp., and Inland Ocean, Inc.

For the reasons discussed below, the Commission is granting rehearing to require offsets of the refund amounts and costs permitted under section 110 of the Natural Gas Policy Act of 1978 (NGPA) and to allow first sellers to request a waiver of a portion of the refund corpus, in certain circumstances, if that corpus is uncollectible from certain parties. The Commission is denying rehearing in all other respects.

II. *BACKGROUND*

On September 20, 1984, the Commission issued Order No. 399 (the Btu refund rule) which implemented the decision of the United States Court of Appeals for the District of Columbia Circuit in *INGAA*.[4] Order No. 399 requires all first sellers to make the refunds resulting from the court-ordered adjustment in the method used to measure the energy content of natural gas (i.e., British thermal unit or Btu). First sellers and pipelines are, under Order No. 399, permitted to choose the method for payment of the refund. However, Order No. 399 prohibits offsets of this refund by production-related costs permitted under section 110 of the Natural Gas Policy Act (NGPA). In addition, the rule requires pipelines to pass through refunds in a lump-sum cash payment to those customers actually overcharged. It also requires pipelines to file refund reports with the Commission describing those refunds received and those refunds still outstanding.

Eleven petitioners request rehearing of Order No. 399. On October 24, 1984, the Commission granted rehearing for the limited purpose of further consideration.[5] In

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[4] In INGAA, the court concluded that charges for gas must be determined by measurement of Btu's under wet conditions rather than the "as delivered" basis as promulgated by the Commission. *See* Order Denying Rehearing and Clarifying Order No. 93, 46 Fed. Reg. 24,537 (May 1, 1981) (Order No. 93-A).

[5] 49 Fed. Reg. 43,543 (Oct. 30, 1984).

addition, the deadline for refunds by large first sellers was extended from November 5, 1984, until ten days after the issuance of the rehearing order. The deadline for small first sellers remains May 3, 1985.

Petitioners argue that the Commission erred in prohibiting offsets of the Btu refund amounts by production-related costs authorized by contract under section 110 of the NGPA (section 110 costs). For the reasons discussed below, the Commission is granting rehearing on this issue and is modifying the refund procedures to require a limited offset of prior-incurred section 110 costs and Btu refunds. The Commission also finds that it has the discretion to waive a portion of the refund that is uncollectible in certain circumstances. In addition, the Commission also concludes that section 110 allowances must be measured under the wet rule. Clarification is also provided to require that an operator designated by a large first seller must pay that large first seller's portion of the refund by the first refund deadline.

Petitioners also raise several substantive issues concerning the refund procedures and whether refunds are required. After careful consideration of these issues, the Commission finds that the petitioners' arguments are without merit. Although the petitioners restate comments and arguments already considered and addressed in the final rule, the Commission believes that further explanation of the reasons for its decision will be beneficial.

III. *DISCUSSION*

A. *Refunds are Due*

Pitts Oil Company, Sage Energy Company and Clayton W. Williams, Jr., Company assert that the Commission erred in its conclusion that refunds are legally required and that, because of this error, the Commission failed to consider the equitable considerations that weigh against requiring refunds. The Commission disagrees.

In Order No. 399, the Commission ordered refunds under the *INGAA* decision. To do otherwise may have effectively sanctioned ceiling prices higher than the maximum lawful prices prescribed by the NGPA.

In *Consumers Federation of America* v. *FPC*,[6] the court offered guidance to the Commission in evaluating the complex and difficult questions associated with a refund process under the Natural Gas Act:

> In matters of prospective and retroactive effect, *there are large questions of equity and public interest—both for agencies and for courts. While full refund under an invalid order is a sound basic rule, it may be offset, at least in part, by the lack of a mechanism to restore the full status quo ante . . .* [and] the fact that consumers may have had the benefit of some increase in supply that would not have [otherwise] been forthcoming . . . .[7]

That guidance is applicable here.

There are substantial equitable considerations that support a discretionary order of refunds. First, because the Commission promulgated the dry rule, revenues that first sellers collected for their gas exceeded the revenues that they would have received if those revenues had been calculated using the wet rule. Those excess revenues were paid by consumers through higher gas prices at the retail level. Consequently, the Commission believes that fairness and equity require that consumers benefit through a refund of those overcharges. Second, the Commission's order promulgating the dry rule was strongly contested from the day it was first explicitly announced. First sellers who relied on that interpretation knew (or should have known) that their entitlement to the financial benefits from the application of the dry rule would

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[6] 515 F.2d 347 (D.C. Cir. 1975).

[7] 515 F.2d at 359 (emphasis supplied).

be contingent upon a favorable adjudication by the courts. Many first sellers participated extensively in the litigation that ultimately resulted in the dry rule being struck down. The Commission defended its adoption of the dry rule vigorously. The Commission's position, as well as that of first sellers, was decisively rejected by the United States Court of Appeals, and the Commission's petition for certiorari was denied by the Supreme Court. Having lost that dispute, the first sellers cannot reasonably conclude that they are nevertheless entitled to retain the economic benefits they would have enjoyed had they prevailed.

B. *Interest is Required*

Pitts Oil Company and other petitioners argue that the Commission erred by requiring first sellers to pay interest on the refund amounts due. They note that the imposition of interest is discretionary and argue that requiring interest is inequitable.

The Commission is not persuaded that equity favors a general waiver of the interest requirement although it does acknowledge that waivers may be appropriate in specific cases. Specifically, interest charges reflect a reimbursement to the rightful owner of the value of the use of funds held by first sellers. Fairness to consumers dictates that first sellers pay interest on the Btu refund amounts owed. The rule uses the Commission's existing regulations for calculating interest because these regulations balance the interests of sellers and purchasers.

C. *Section 110 Offsets*

The Commission permits first sellers to retroactively collect certain production-related costs authorized by contract under section 110 of the NGPA (section 110 costs).[8]

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[8] 18 C.F.R. § 271.1104(e) (1984). *See generally*, Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978

In their comments on the interim rule in this proceeding, several commenters proposed that the Commission permit first sellers and pipelines to offset Btu refunds and section 110 costs. Several commenters opposed the allowance of an offset.

In Order No. 399, the Commission decided that first sellers may not offset Btu refunds with section 110 costs. Essentially, the Commission thought that permitting such offsets would complicate the Btu refund process, undermine contract disputes, and prevent the Btu refunds from reaching as many of the customers actually overcharged as possible. For these reasons, the Commission believed that it was more appropriate to segregate the payment of the Btu refunds from the collection of section 110 costs.

Eight petitioners again raise the issue of offsetting Btu refunds with section 110 costs and argue that the Commission erred by prohibiting an offset.[9] Generally, the petitioners assert that, when the practical considerations on which the Commission's decision is based are

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and Establishing Policy Under the Natural Gas Act, 48 Fed. Reg. 5152 (Feb. 3, 1983) (Order No. 94-A) (Final Rule and Order on Rehearing of Order No. 94); 48 Fed. Reg. 24,039 (May 31, 1983) (Order No. 94-C) (Order Denying Rehearing and Denying Petitions for Stay); 49 Fed. Reg. 565 (Jan. 5, 1984) (Order No. 94-E) (Clarification of Order No. 94). *See also,* Delivery Allowances Under Section 110 of the Natural Gas Policy Act of 1978, and Compression Allowances Under Section 110 of the Natural Gas Policy Act of 1978, 48 Fed. Reg. 5180 (Feb. 3, 1983) (Interim Rule); 48 Fed. Reg. 44,495 (Sept. 29, 1983) (Order No. 334) (Final Rule and Order Granting in Part and Denying in Part Rehearing of Interim Rule); 49 Fed. Reg. 56 (Jan. 3, 1984) (Order No. 334-A) (Order Denying Application for Rehearing of Order No. 334 and Denying Requests for Stay of Order No. 334).

[9] Pennzoil Co., Mesa Petroleum Co., Pogo Producing Co., Consolidated Gas Transmission Corp., Tennessee Gas Pipeline Co., Kerr-McGee Corp., Pitts Oil Co., Sage Energy Co., and Clayton W. Williams, Jr., Co.,

examined, none provides sufficient reason for prohibiting offsets.

The petitioners also argue that the Commission failed to consider the effects of prohibiting offsets on the natural gas market. Specifically, petitioners assert that many pipelines have not paid the section 110 costs owed to producers. First, sellers argue that payment for past due section 110 costs will not be made until after decontrol on January 1, 1985, and that the amounts in question will be subsumed within the amounts paid for decontrolled gas because of price bargaining. In contrast, pipelines argue that, because section 110 costs are flowed through to future customers under the purchased gas adjustment clause, payment of the section 110 costs will cause a sizable increase in rates at a time when the gas market is particularly vulnerable to the price effects of deregulation. Both first sellers and pipelines agree that these potential market distortions are mitigated by permitting offsets of section 110 costs and Btu refund amounts, and, therefore, consumers benefit.

The Commission believes petitioners' arguments have merit and consequently, for the reasons discussed *infra*, will require the offsets under certain carefully circumscribed conditions. Before discussing our reasons in depth, however, the Commission wishes to emphasize four main points:

1. The Commission is ordering refunds with interest at prime based on its reading of the implicit mandate of the *INGAA* case.
2. The Commission is requiring an offset of only those *legitimate* production-related costs described in its Order No. 94 series. Parties may still protest any section 110 costs which they believe are not properly offset or are still outstanding.
3. The Commission believes that principles of cost incurrence suggest that amounts owed consumers from Btu adjustments and amounts con-

sumers owe for 110 costs can best be settled through an offset procedure that matches those customers' liabilities and entitlements. In other words, intergenerational inequities are minimized through an offset procedure.

4. The Commission believes that offsetting legitimate section 110 costs against Btu refunds before January 1, 1985, will aid in its continuing effort to minimize the distortions to the market price of gas by requiring that gas costs will be less encumbered by prior-incurred charges. As a result, buyers may better exercise their discretion in seeking the least cost gas supply, thus sending proper signals to the wellhead to reflect market-based prices. *See* discussion of Order Nos. 380 and 380-A (Minimum Bill Rule), *infra.*

The reasons for ordering refunds with interest are discussed under Part III A and B, *supra.* The other three will be discussed seriatim.

Section 110 Costs, Order Nos. 94, *et al.*

The Commission's implementation of its statutory authority under section 110 allows only certain described amounts to be collected by first sellers from pipeline purchasers.[10] Before a first seller may collect production-

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[10] Section 110 of the NGPA provides in pertinent part:

> [A] price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under [Title I] if such first sale price exceeds the maximum lawful price to the extent necessary to recover—
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> * * *
>
> any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

Section 110(a)(2). *See* note 8, *supra*, at 7; *see also* Regulations Implementing Section 110 of the Natural Gas Policy Act, and

related costs, there must be express contractual authority allowing the collection. This requirement assures that the production activity is, in fact, being performed and that only amounts necessary to recover the costs of the activity may be collected.

The Commission at first allowed individual applications for these costs. In recognition of the likely burden of this procedure, and in order to remove any unwarranted delay in first sellers receiving section 110 adjustments, the Commission subsequently provided self-implementing rules. However, "mindful of the potential for abuse inherent in any self-implementing regulatory scheme," it warned that field audits would ensure that sellers adhere to the rules.[11]

Establishing Policy Under the Natural Gas Act, 48 Fed. Reg. 5190 (Feb. 3, 1983) (Order No. 94-B) (Docket No. RM80-47-003) (issued Jan. 24, 1983); Order Denying Rehearing and Denying Stay of Order No. 94-B, 48 Fed. Reg. 24,051 (May 31, 1983) (Order No. 94-D) (Docket Nos. RM80-47-003, *et al.*) (issued May 24, 1983); 49 Fed. Reg. 565 (Jan. 5, 1984) (Clarification of Final Rule) (Docket No. RM80-47-002) (issued Dec. 29, 1983,) (Order No. 94-E); Regulations Implementing Refund Procedures under Subpart K of Part 271 for Production-Related Costs, 48 Fed. Reg. 44,492 (Sept. 29, 1983) (Order No. 333) (Docket No. RM83-6-000); 48 Fed. Reg. 44,495 (Sept. 29, 1983) (Final Rule and Order Granting in Part and denying in Part Rehearing of Interim Rule) (Docket Nos. RM80-73-000, *et al.*) (issued Sept. 27, 1983) (Order No. 334); 49 Fed. Reg. 56 (Jan. 3, 1984) (Order No. 334-A) (Order Denying Application for Rehearing of Order No. 334 and Denying Requests for Stay of Order No. 334) (Docket Nos. RM80-73-004, *et al.* and RM80-74-004, *et al.*) (issued Dec. 27, 1983).

[11] 48 Fed. Reg. 5152, 5160 (Feb. 3, 1983). The Commission stressed that the collection of an amount not so authorized would be a statutory pricing violation with potential civil and criminal penalties under sections 504(b)(6). *See also* 48 Fed. Reg. 5152, 5170 (Feb. 3, 1983). The Commission established a Production-Related Costs Board that focused primarily on the obligation of sellers to justify any section 110 allowance in response to staff audits. The procedure allows a resolution of disputes on the amount of refunds that may be due if the seller collects unauthor-

The typical transaction under the Commission's section 110 rules consists of: The parties' determination of express contractual authorization, performance of the service, submission of a description of charges, billing for the charges, and collection of payments.[12] The purchaser may dispute the charges and ask the first seller to validate the proposed charges before making payment.[13] The written description requires a showing by well or by completion location as to the amount and type of production-related service.[14] First sellers must retain records to identify amounts collected and the basis for their collection.

In issuing its section 110 rules, the Commission also required that payments for certain section 110 costs be collected in installments between March 7, 1983, and December 31, 1984. However, the Commission is aware from the public hearing in this proceeding and other filings that many production-related costs have not yet been paid.[15]

It is in the context of those section 110 rules that the Commission finds the opportunity to better serve the public interest by providing an offset procedure for the timely payment of both the Btu refunds and the collection of legitimate section 110 costs. Before discussing the reasons for availing itself of this opportunity, the Commission wishes to emphasize that the offset procedure does *not* affect the *amount of refunds* owed pursuant to

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ized amounts. A complaint filed pursuant to § 385.206 activates the Board if an allowance is thought to be charged, collected or otherwise not paid in violation 18 C.F.R. § 271.1104. Any person or party can so file.

[12] *Id.* at 5161-62.

[13] *Id.* at 5162.

[14] 18 C.F.R. § 271.1104(f) (1984).

[15] Tr. 46, 86, 92, 117-119, 125-126, In the matter of: Refunds Resulting From Btu Measurement Adjustments, Docket No. RM84-6-000, Public Hearing of May 24, 1984.

the *INGAA* decision. The offset procedure is a mechanism for accomplishing the refund.[16] Refunds are due and the Commission does not intend to allow the offset procedure to be used to bargain away or escape liability for refunds. Indeed, the Commission is requiring pipelines to report the information provided to them by first sellers to justify section 110 costs under reports mandated in Order No. 94-A *et al.*, and the reports due under Order No. 399, as discussed *infra*.

There are several dockets that present issues relating to the failure to comply, or the impossibility of complying, with the Commission's prescribed schedule for payment of past due section 110 costs.

Mobil Oil Corporation filed a complaint on August 28, 1984, (Docket No. GP84-50-000) alleging a massive failure on the part of the vast majority of the interstate pipelines to pay section 110 costs in the installments required by the regulations.

On September 7, 1984, Transcontinental Gas Pipe Line Corporation filed a petition setting forth a pipeline's view of this situation (Docket No. GP84-53-000) and requesting the Commission to extend the schedule for paying section 110 costs so that it may pay them in 12 monthly installments beginning after verification of the invoice and ending no later than June 30, 1986.

Also, on September 7, 1984, the Indicated Producers (Shell, Citgo, Gulf, Mitchell, Mobil, Sun, Texaco, and Union Oil) filed a petition (Docket No. GP84-51-000) alleging that most interstate pipelines are arbitrarily refusing to pay the section 110 costs, and that the practice is so widespread as to amount to a defiance of the legitimate processes of the Commission. The Producers urged the Commission to direct the pipelines to offset the

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[16] *See* Cities Service Gas Co. v. FPC, 535 F.2d 1278, 1290 (D.C. Cir. 1976); Belco Petroleum Corp. v. FERC, 589 F.2d 680, 686 (D.C. Cir. 1978).

section 110 costs against the Btu refund payments or to order the pipelines to pay the section 110 costs within 30 days after receipt of billings from a producer. Tennessee Gas Pipeline Company filed a pleading in response to the Indicated Producers' Motion, supporting their request for offsets, and moving that the petition in Docket No. GP84-51-000 be consolidated with Mobil's Complaint (Docket No. GP84-50-000) and the petitions for rehearing of the Btu rule (Docket Nos. RM84-6-001, *et al.*), i.e., the instant proceeding.

The Commission will address the issues raised in the other proceedings in due course. However, to the extent the pleadings assert uncontested facts, the Commission will rely on them to conclude that (for whatever reasons) substantial portions of first sellers' bills for previously unrecovered section 110 costs have not yet been paid, and will probably not be paid before January 1, 1985.

Principle of Matching Cost Incurrence.

Order No. 399 expressed concern that the Btu refunds would not reach the customers actually overcharged if offsets were allowed. However, requiring the offset mechanism would come closer to matching the customers who are entitled to Btu refunds with the customers who received the benefits or caused the incurrence of section 110 costs.

While Btu refunds are owing for gas delivered from December 1978 through December 1983, payments under the "dry" rule for that five year period were, for the most part, collected from gas customers in 1982 and 1983, through purchase gas adjustment clauses (PGA) after Order No. 93 became final and effective in late 1981.[17] Order No. 399 required that those customers ac-

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[17] *See* Rules Generally Applicable to Regulated Sales of Natural Gas. 45 Fed. Reg. 49,077 (July 23, 1980) (Order No. 93); Order

tually overcharged in 1982 and 1983 were to receive the Btu refund amounts. The retroactive section 110 costs that first sellers and some pipelines seek to offset are for services rendered in 1980, 1981, 1982, and *early 1983*. Under Order Nos. 94 *et al.*, the Commission directed that payment of certain section 110 costs incurred prior to March 1983 be passed on to customers in equal installments, prior to January 1, 1985. Payment of section 110 costs was allowed on a current basis beginning in March 1983. As a result, the customers who will pay for section 110 costs incurred before March, 1983, may not be the same customers who incurred the costs. As a practical matter, most pipelines did not begin paying the costs on a current basis in the spring of 1983. In fact, testimony in the public hearing on May 24, 1984, indicated that, at that time, some pipelines had still paid *no* production-related costs.[18] Consequently, for purposes of ordering and discussing the offset, prior-incurred section 110 costs will constitute any costs properly owed on gas received on or before January 19, 1984,[19] where such costs have not been paid to first sellers prior to the issuance of this order.

The concern here should not be that these dates are different but rather to what extent customers who may be entitled to refunds because they were billed in that time period left the pipeline systems during 1982, 1983, or 1984. Simply put, if a customer was purchasing from

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Denying Rehearing and Clarifying Order No. 93, 46 Fed. Reg. 24,537 (May 1, 1981) (Order No. 93-A); Order Vacating Partial Stay and Amending Regulations, 47 Fed. Reg. 614 (Jan. 6, 1982) (issued Dec. 24, 1981).

[18] Tr. at 86, 92, 117, 119, 125-6, 134, 166-7, and 174-6, In the Matter of: Refunds Resulting From Btu Measurement Adjustments, Docket No. RM84-6-000, Public Hearing of May 24, 1984.

[19] On January 19, 1984, the Commission rescinded the dry rule. 49 Fed. Reg. 3072 (Jan. 25, 1984). Thus, choosing this date results in congruous end dates.

a given pipeline during all three years (1982-84), and that pipeline was obligated to pay section 110 costs to its first sellers, that customer both paid for gas measured on a dry basis and was liable for section 110 costs. Therefore, the offset will leave that customer whole.

The fact that the volumes purchased by that customer may have fluctuated over the period is not troublesome.[20] Current regulatory methods involve designing rates on a test period basis. That method allows rates to be charged on the assumption that there will be a reasonable relationship between costs incurred and revenues collected. Any closer matching would require a major departure from the Commission's current regulatory scheme.

Further, if system-wide volumes drop, the unit costs of individual services will increase. The aggregate impact on a given customer will depend on the change in that customer's load relative to the total volumes moved by the system. Such subtleties are impossible to balance precisely. The assumption is that, although these fluctuations will work to the benefit of the customer part of the time, and to its detriment other times, over time the balance is equitable.

Consequently, for purposes of considering the impact of an offset, variations in gas takes by particular customers do not militate against the offset.[21] Also, changes in customers of local distribution companies are not a sufficient basis for rejecting the offset.

With an offset mechanism, the Commission is concerned that customers who left the system after Btu

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[20] Prior to Order No. 380, minimum bills encouraged stable takes.

[21] Available data collected by the Energy Information Agency from FERC Form No. 2 indicate that, for the years 1980-1983, customers' purchases tended to drop, albeit in rough proportion to each other. This probably in large part reflects conservation practices and economic recession effects.

charges were passed through in 1982 and 1983 may be denied Btu refund benefits to which they would otherwise be entitled under Order No. 399. However, the data does not suggest this is a major problem.[22] Although the Commission decided to pass through section 110 costs incurred from 1980 to 1983 to customers on the system in 1983 and 1984, it would nonetheless be more equitable for these prior-incurred costs to be borne, as nearly as possible, by the customers who benefited from the service. Indeed, the Commission did not intend that prior-incurred section 110 costs be passed through to customers after January 1, 1985. Since, to date, many pipelines have not passed on these costs onto their customers, it would seem that this prospect is imminent. The offset mechanism will, at least, reduce the amount of section 110 costs which must be passed through to

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[22] For example, according to data compiled by the Energy Information Administration (EIA) from FERC Form 2 reports submitted by the interstate pipelines, no customer left Columbia's system in 1982, and only one customer, Roy Proffitt, left in 1983. This customer bought 55,137 Mcf of gas from Columbia in 1982 whose total 1982 sales for resale in that year amounted to 928,422,406 Mcf. No customer left ANR's system in 1982, and only two customers left in 1983: Town of Home, whose 1982 purchases from ANR were 2,120 Mcf and Texas Eastern Transmission which purchased 377,000 Mcf in the same year. This is a total of 379,120 Mcf out of ANR's total 1982 sales for resale of 548,418,527 Mcf. (Tetco, however, appears to have bought gas from ANR only in 1982. It does not appear as a purchaser in 1980, 1981, or 1983.) In 1982, only two customers left the Trunkline system, and none in 1983: Houston Texas Pipeline, which bought 298 Mcf in 1981 and Tennessee Gas Pipeline, which bought 13 Mcf in the same year, a total of 311 Mcf out of Trunkline's total sales for resale of 499,230,584 Mcf. EIA does not have these data for Transco's 1981 sales for resale. However, no customers left the system in 1983. It can readily be seen that the customers dropping off of these various systems account for a negligible percentage of each pipeline's total sales for resale. (EIA has just begun to compile disaggregated sale for resale data as submitted in the Form 2 reports and not all of the data have as yet been verified.)

customers after January 1, 1985. The longer the pass through of section 110 costs is delayed, the greater will be the disparities between those who pay the costs and those who benefited from them. This intergenerational effect is significantly aggravated in the case of prior incurred costs by the increased ability of partially supplied customers to shift their load from one pipeline-supplier to another pursuant to Order Nos. 380 and 380-A.[23] The offset achieves a closer matching of those who benefited from the section 110 costs with those who will be required to pay them.

Under Order Nos. 94-A, *et al.*, the customers who will pay for section 110 costs may not be exactly the same customers who caused the incurrence of those costs. This occurs because of the dynamic nature of each customer's demand requirement over time. Nonetheless, if these costs can be recovered now through an immediate offset, the likelihood is greater that those customers who pay the costs are those customers who actually caused their incurrence. Hence, there would be less intergenerational inequity if immediate offset is implemented.

It is clear, therefore, from the aspect of intergenerational equity that immediate offset provides a far superior result than would occur if immediate offset were

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[23] Elimination of Variable Costs from Certain Natural Gas Pipeline Minimum Bill Provisions, 49 Fed. Reg. 22,778 (June 1, 1984) (Order No. 380); Order Denying Rehearing and Granting in Part Applications for Stay, 49 Fed. Reg. 31,259 (Aug. 6, 1984); Order Denying Rehearing and Granting Clarification, 49 Fed. Reg. 43,635 (Oct. 31, 1984) (Order No. 380-B); Order on Rehearing Reaffirming Application of Rule to Minimum Take Provisions and Denying Requests for Waiver, 49 Fed. Reg. 43,625 (Oct. 31, 1984) (Order No. 380-C). *See also*, Natural Gas Pipeline Company of America, 28 F.E.R.C. ¶ 61,174 at 61,332 at n.15 (1984): ". . . we fully anticipate that companies with more than one supplier will "shop" for the cheapest source of supply. But we also must be aware of the potential effects of such swinging on those gas purchasers who lack these competitive advantages."

not permitted. Because immediate offset provides for a closer association between cost causation and cost responsibility it is clear that an offset is the most efficient and equitable method for distributing Btu refunds and ensuring the prompt collection of already incurred section 110 costs.

Impending Partial Decontrol at the Wellhead.

In adopting the offset mechanism for accomplishing the Btu refund, the Commission is also considering the public interest in the context of current economic circumstances and in the context of current statutory and regulatory schemes.

On the first of January, 1985, the Natural Gas Policy Act mandates that the price of the large portion of flowing natural gas be deregulated at the wellhead. The purpose of the deregulation is to solve a serious and recurrent problem which had existed in the natural gas market for years. That problem was the inability of the interstate market to achieve a balance between supply and demand. In order to achieve that balance in the newly deregulated marketplace, the market price should be as "pure" as possible, i.e., undistorted by costs unassociated with *current* supply. Only through a "pure" market price can the competitive marketplace foster the goals Congress intended wellhead deregulation to achieve.

The Commission has been concerned for some time that the price of gas reflected in the purchase gas adjustment filings of pipelines reflect as nearly as possible the cost of gas at the wellhead. As discussed *supra*, the Commission tailored the Order No. 94-A series to insure that production-related costs which accrued as a result of gas sold during previous periods did not distort the price of gas after January 1, 1985.

Specifically, Order No. 94-A was concerned with

> . . . prevent[ing] any large scale economic dislocations that may result from any one seller or group

> of sellers attempting to recover the allowances for prior costs in one lump sum or a few large payments.[24]

On January 24, 1983, the impact of decontrol on the collection of generic allowances was uncertain. Consequently, the collections were to be made

> under a schedule of payments that ensure[d], as nearly as possible, that the amounts would be paid in equal installments.[25]

As noted above, these payments have not, for the most part, occurred. Some pipelines have passed on prior-incurred production-related costs to their customers; others have not. To the extent that prior-incurred production-related costs are still unpaid, the Commission is faced now with the prospect of having those costs appear as incremental increases in the cost of gas after January 1, 1985. The Commission had intended to avoid this result.

The Commission understands that the aggregate of the producers' claims for section 110 costs may approximate the aggregate of the producers' liabilities for Btu refunds. Thus, the offsets will spare consumers from potentially large rate increases in early 1985 and will avoid the transmittal of false expectations about future natural gas prices by the relatively painless method of using their Btu refund credits as an offset. The gas producers will be able to settle their long-past due accounts for section 110 services rendered and their liability for Btu refunds without disrupting current or future natural gas prices. The pipelines will be able to match these accounts with first sellers and consumers and enter the era of decontrol and enhanced competition without

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[24] 48 Fed. Reg. 5152, 5169 (Feb. 3, 1983).

[25] *Id.* at 5169.

the burden of attempting to pass through producers' bills for services rendered years ago.

The Commission's concern with this issue is evidenced by a filing of Tennessee Gas Pipeline Company in Docket No. RP85-3-000, dated October 3, 1984, for a procedure to permanently revise its FERC Gas Tariff PGA provisions to establish an extraordinary gas subaccount to record amounts in excess of $1 million which Tennessee would be required to pay for gas supplies as a result of Commission or court action. Under this proposal, Tennessee would calculate individual customer surcharges based on Tennessee's sales to that customer during the period to which the extraordinary payment pertained. Tennessee's two justifications for this proposal were that radical changes in purchase patterns will occur for some of its customers since the period to which the retroactive charges apply and that the recovery of such large retroactive payments through the current PGA mechanism would result in a distortion of the current gas markets. In support of its proposal, Tennessee noted Columbia Gas Transmission, a pipeline customer, purchased approximately 14 percent of the gas sold by Tennessee to jurisdictional customers during August 1980-1983, compared to only seven percent in the first six months of 1984. Use of the normal Account 191 mechanism to recover Order No. 94-A retroactive payments would allow customers with relatively declining purchases to bear *less than* their "fair share," and require customers with relatively higher purchases to bear *more than* their "fair share."

Consolidated Gas Transmission Corporation intervened in support of Tennessee's proposal with this qualification:

> While Movant supports Tennessee's proposed methodology, the simplest and most efficient approach to this problem is to permit pipelines to offset Order

No. 94 payments against Order No. 93 refunds received from producers.[26]

Another intervenor, Niagara Mohawk Power Corporation, expressed concern that absent the direct billing mechanism, its customers "would be paying a share of the retroactive costs properly attributable to past sales to Columbia's customers. The retroactive costs are decidedly different than normal refunds that would be flowed through in PGA filings." [27]

On November 5, 1984, in Docket No. RM85-14, Natural Gas Pipeline Company of America (Natural) filed a petition for authority to institute a special, one-time, lump sum billing procedure to recover from Natural's customers retroactive payments for "production-related costs" paid by Natural to producers by December 31, 1984. Natural proposes to recover approximately $140 million in retroactive payments from its customers 15 days after the latter of February 1, 1985, or the date on which both the Docket No. RP83-68 and South Georgia refunds have been made. Natural asserts that, because approximately $120 million is owed its customers in these proceedings and another $60 million in Btu refunds will be refunded to its customers, its customers would have sufficient funds to make this payment. Natural's justification for this approach is similar to that offered by Tennessee.

In anticipation of statutory changes on January 1, 1985, considerable negotiations will occur between pipelines and producers and between producers and end users. This contract price negotiation should result in a relatively undistorted market price for gas. To the ex-

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[26] Motion of Consolidated Gas Transmission Corporation for Leave to Intervene in Support of Direct Billing Proposal in Docket No. RP85-3-000 at page 3.

[27] Petition to Intervene of Niagara Mohawk Power Corporation in Docket No. RP85-3-000 at page 3.

tent that historical costs are allowed to be included in these contract price negotiations and will be reflected in the base price from which these negotiations stem, consumers will be ill-served. The Commission's concern is that without an offset, legitimate production-related gas costs incurred in the past would not be paid by customers in the system during the period of incurrence, but rather would be paid by present and future customers who received no economic benefits. Those costs, while authorized under the Order No. 94-A series and owed under contracts, are nonetheless inappropriate signals to the market in 1985, and, therefore, inconsistent with the Commission's goal of achieving a balance in supply and demand through the workings of a competitive market at the wellhead.

The Commission's attempts to work toward an undistorted market price for gas at the wellhead is reflected in this Order Nos. 380 and 380-A which removed variable costs from pipelines' minimum commodity bills. Prior to Order No. 380, minimum commodity bills insured pipelines that their customers would pay for a minimum amount of gas and system capacity regardless of their needs and whether or not cheaper gas was available.

By removing the variable costs from minimum commodity bills, Order Nos. 380 and 380-A significantly changed the bases for purchasing decisions across the industry. Essentially, the economic penalty for changing suppliers was substantially reduced. Consequently, partially supplied customers and customers with alternate fuel capability are much freer to make purchasing decisions based on price, and, in fact, have probably done so.

The data to demonstrate this phenomenon are not yet available. However, in seeking a stay from the court of the Commission's Order No. 380, the "Minimum Bill

Rule," [28] the pipelines acknowledged that proof of switching before the fact was impossible, but they assured the court that "it is overwhelmingly likely that purchasers of gas will 'swing' a substantial amount of their purchasers away from their current pipeline suppliers, next contract year, if freed from contractual obligations by [Order No. 380]." [29] The Court denied the stay applications by Order of September 19, 1984, and refused to rehear its denial by Order of October 18, 1984. Thus, Order No. 380 is in effect and minimum bill tariff provisions are unenforceable as to variable costs.

The Commission's methodology for accomplishing refunds is carefully weighed in light of this new purchasing freedom. If production-related costs are flowed through the PGAs, it is entirely possible that partially-supplied customers will be able to avoid those charges by changing suppliers. Indeed, the fact that PGA periods are staggered among pipelines further increases the opportunity for such avoidance. It is not the Commission's intent that the combined effects of its decisions should inadvertently or purposely result in full requirements customers bearing the brunt of prior charges because they cannot leave the system.

The Commission is concerned, therefore, that one result of forbidding an offset would be that captive or full requirements customers may shoulder more than

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[28] *See* Note 23, *supra*, at 19.

[29] Suggestion for Rehearing of the Order of September 19, 1984, Denying Motion for Stay and Suggestion for Rehearing En Banc, filed September 16, 1984, by ANR Pipeline Company in Wisconsin Gas Company, *et al.* v. FERC, D.C. Cir. No. 84-1358 *et al.*, at 4. *See also* the Motion of Great Lakes Transmission Company for Stay Pending Review of Federal Energy Regulatory Commission Orders Invalidating Previously Approved Tariff Provision, filed August 13, 1984, in Wisconsin Gas Company v. FERC, at p. 22 ("Natural [Gas Pipeline Co.] has advised Great Lakes that it is not planning to take any volumes for the remainder of the contract year.").

their proper share of the burden of prior costs incurred on the system. The Commission believes that when most of the distortion is taken out of future PGAs (which distortion has resulted from prior Commission approval of certain costs), the threat that partially supplied customers may leave the system will be greatly reduced and this should better protect full requirements customers. The offset mechanism, the Commission believes, will help prevent the possibility of partially supplied customers escaping liability of their share of past section 110 costs.

First sellers have the option of pursuing their contract rights at law in order to collect the costs owed to them and/or to engage in settlement negotiations with the pipelines over the issue of what costs are owed. Arguments are raised that, because of current market conditions, any amounts resulting from such negotiations or litigation resulting in production-related costs being paid to the producer would likely be paid by pipeline shareholders rather than consumers. Specifically, the argument is that the marketplace would not bear the increase in price at the burner tip which would result from the inclusion of these costs. If that were the case, the pipeline shareholders would have to pay the costs themselves or lose markets.

If the Commission, on the other hand, requires Btu refunds to be offset by production-related costs, it is not the shareholders who would bear the costs but rather the consumers which originally caused their incurrence. As a matter of equity, then, the question is whether the offset procedure would work to the detriment of consumers. In response, it is important to note that the production-related costs here are costs which have actually been incurred for past periods and which are authorized under the Commission's regulations. Consumers have had the benefit of the services and should bear the costs associated with those services.

To the extent market restraints exist and shareholders must subsidize production-related costs which occur either outside of or over and above the offset, consumers have only rightfully been compensated for their pipelines' unfortunate market position. Either way, it would seem that the rights of the consumers are being carefully protected.

Calculation of the Offset.

The Commission recognizes that the dollar amount of production-related costs owed under numerous pipeline first sellers' contracts remains in dispute.[30] This issue is of great concern to the Commission in allowing and fashioning an offset procedure. Only legitimate production-related costs should be offset against the Btu refunds.

Presumably, certain amounts of production-related costs which pipelines and the first sellers have resolved have been or are being paid under existing payment agreements. However, if certain undisputed costs have

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[30] Order No. 399 noted that the Commission's section 110 rules are pending on appeal, while the Btu refund obligation arises as the result of a court decision. The concern is that the producers' claims for section 110 costs are subject to modification or extinguishment by the courts, while their liabilities to make the Btu refunds have been finally established by the courts. Thus, the producers are asking to offset an inchoate or contingent claim against a final, adjudicated liability.

Nevertheless, under the schedule prescribed by the Commission, collection of the section 110 costs should be completed by December 31, 1984, long before the Fifth Circuit decision is expected to be rendered in the pending appeal of Texas Eastern. Texas Eastern Transmission Corp. v. FERC, Docket No. 83-4390 (5th Cir. 1984). The Commission has refused to stay its section 110 rules. The Fifth Circuit has not granted a stay. The Commission's collection schedule and deadline were not appealed. So unless the pipelines meet the December 31 payment date, or the deadline for paying is extended, the retroactive section 110 charges are due and payable even though they are still subject to judicial review. The mere fact that the rule is pending judicial review does not mean all production-related costs are in dispute.

not been recovered or are not presently being recovered consistent with a Commission approved mechanism, they must be offset against the Btu refund.

If collection of past production-related costs were the only goal of the offset, it would be best achieved by allowing producers to offset the full amount of production-related costs claimed. However, the pipelines claim that the production-related costs appear to be overstated for any number of different reasons.[31] To the extent there is validity to any of the pipeline's reasons for not paying the full amount, allowing full offset would understate the Btu refunds.

This procedure does not attempt to resolve all production-related costs issues. This leaves pipelines and purchasers free to dispute the costs in a proceeding which the Commission has designed specifically to deal with these costs. One purpose of this proceeding is to assure that only legitimate production-related costs are offset from Btu refunds. The Commission will order further Btu refunds if it finds that production-related costs have been overstated for purposes of the offset.

In light of all these considerations, the Commission will extend the deadline for large first sellers to make Btu refunds to the pipelines until December 31, 1984, and to offset all of their unpaid and undisputed billings for section 110 costs rendered before January 19, 1984, the date the Commission rescinded the "dry" rule and reinstated the "wet" rule. Therefore, the amount re-

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[31] In response to the producers' pleas for prompt payment of their claims, various pipelines recited instances where claims for section 110 allowances were clearly in error. Delivery distances were found to be inaccurate. Charges were billed for periods when wells were not producing. Explicit contractual authority did not exist for certain claims. However, the "massive failure" of the pipelines to pay any substantial part of their billings from producers for section 110 allowances is not based on pipeline claims that the bills from producers, in general, are not lawfully owed.

funded by a first seller shall be the difference between the Btu refund amount as calculated under Order Nos. 399, *et seq.* and the unpaid but undisputed billings for section 110 costs.

Procedures.

The Commission stated in Order No. 399 that permitting offsets will complicate the Btu refund process. On reconsideration, however, and in the light of expected market conditions and compelling equities, the Commission has devised administrative mechanisms for requiring legitimate section 110 costs to be paid by means of offsetting Btu refund obligations. These procedures are not unduly complicated and assure that the Commission and interested consumers will have sufficient information concerning the offset transactions to identify any section 110 costs that have been improperly paid or any under-credited Btu refund amounts. The ability of interested parties to monitor payments of section 110 costs should not be affected by whether those payments are made by checks from the pipelines or by credits for Btu refund obligations owed to the pipelines. The standing and opportunity of consumers to protest the payment of section 110 costs and their recovery by pipelines through PGA clauses will not be affected by whether such payments are made by cash or by offset.

In Order No. 399, refunds were due by the first seller either on November 5, 1984, in the case of large first sellers, and on May 3, 1985, in the case of small first sellers.[32]

Pipelines had to file refund reports by December 18, 1984, for the first set of refunds they received (or should have received) on November 5, 1984, and by

[32] Small first sellers were required to notify pipelines by November 5, 1984, of their intent to defer payments of refunds until May 3, 1985. The deadline for notification is extended by this order to December 31, 1984.

June 17, 1985, for the refunds due by May 3, 1985. A final refund report was due on January 5, 1987, to cover refunds made after May 3, 1985. These reports were to identify the first sellers who had made refunds, and those who had not, the amounts received or due, broken down by seller into principal and interest, and reasons for non-payment, where applicable.

A revised § 154.38(h)[33] covered the pass-through of the Btu refund amounts by interstate pipelines, and related reporting requirements. This revised section essentially required the pipeline to identify those customers who actually paid the Btu overcharges, the amounts they paid, and then to refund that amount plus interest to the overcharged customer, regardless of whether that customer was still on the pipeline's system.

Based on the Commission's decision to require first sellers and purchasers to offset the Btu refunds with undisputed amounts owing retroactively under section 110 of the NGPA, the refund, reporting and pass-through requirements need modification. There are several reasons for this.

First, while the Btu refund amounts due by a first seller should be readily ascertainable, once the volumes of gas sold are agreed upon, the section 110 cost allowances may not be so easily determined. The section 110 cost allowances will vary, depending on such factors as length of gathering lines, actual costs incurred in providing services, and specific contractual arrangements. Therefore, in requiring the offset, the Commission will recognize and make provision for offsets in which both Btu refunds and section 110 cost allowances are sums certain.

The second concern is over the actual or implied pass-through of the retroactive section 110 costs. When a

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[33] 18 C.F.R. § 154.38(h) (1984).

pipeline attempts to pass section 110 costs through in its PGA, intervenors and Commission staff have an opportunity to scrutinize and object to the imposition and level of these costs.[34] When a pipeline offsets, it would not have to reflect the amounts of the section 110 costs offset in its PGA, since it is not attempting to pass them through. Thus, the parties which might otherwise seek to challenge these amounts would be left without a convenient forum in which to challenge section 110 costs, even though they are directly affected by the offset (since it eliminates a refund they would otherwise have received). The Commission therefore believes that it must provide a mechanism by which the pipeline's customers, Commission staff, and other interested parties can review and challenge the section 110 costs for past periods, where these costs are not part of the PGA or a pipeline's rate case.

Therefore, in summary, for Btu refunds, the Commission is requiring the same reports required in Order No. 399 from intrastate and interstate pipelines. Where section 110 costs are offset against the Btu refund, interstate pipelines must include in their reports all the information required in section 271.1104(f) concerning section 110 costs. To ensure that first sellers and pipelines have agreed to the section 110 cost allowances that offset the Btu refund, pipelines must file a first seller concurrence statement as part of their reports. These reports are detailed in ordering paragraphs F, G, and H.

D. *Lump-sum Cash Payments by Pipelines*

Panhandle Eastern Pipe Line Company and Trunkline Gas Company request that the Commission eliminate the automatic and mandatory requirement that pipelines make lump-sum cash refunds to those customers actually overcharged. Instead, petitioners state that the Commission should pass the refunds through using the pipe-

[34] *See* notes 8 and 10, *supra* at 7-11.

lines' PGA mechanism. They argue that, by failing to pass these refunds through a pipeline's PGA the Commission is foregoing an opportunity for significant rate reductions and market preservation. In addition, they argue that matching the Btu refunds to those customers actually overcharged is not possible and that there is no reason to believe that the PGA mechanism will produce inequitable results.

The Commission carefully considered these arguments in the final rule and on rehearing and is retaining the requirement that interstate pipelines must make lump-sum cash payments to those customers actually overcharged for those Btu refund amounts not offset under the procedures established in this order.

The Commission recognizes that the Btu refund might temporarily disrupt the current gas market regardless of the payment method used. Since decontrol of a large proportion of gas supplies takes place at the end of this year, the Commission has sought to limit that disruption. A lump-sum cash payment is less disruptive to the gas market than the use of the PGA because a cash payment to past customers does not adjust current prices and will consequently not send false price signals to current gas customers. In any event, the Commission believes that the offset procedures established in this order will alleviate most of these petitioners' concerns.

E. *Btu Measurement Adjustments to Section 110 Charges.*

Southern California Gas Company and Pacific Lighting Gas Supply Company point out that some first sellers have been paid for section 110 costs and allowances that are expressed in terms of cents-per-MMBtu measured under the dry rule. They request that Order No. 399 be amended to require refunds from first sellers if they have recovered costs that exceed the maximum section 110 allowances under the Commission's regulations, re-

calculated under the wet rule. Although these costs may be included in calculating the section 110 costs to be offset with Btu refunds, the Commission is not establishing procedures in this order to refund those costs.

The Commission agrees with the petitioners that, if payments of section 110 costs, recalculated with reference to the wet rule, have exceeded the maximum allowable costs under the Commission's regulations, refunds are in order. Although the court decision that gave rise to this proceeding [35] did not speak to section 110 allowances, it would be administratively inconvenient for the Commission and the regulated industries to utilize a different Btu measurement under section 110 than in the other sections of the NGPA. Thus, the Commission directs the pipelines and first sellers to review the section 110 billings, paid and unpaid, to ensure that they do not exceed the maximum allowances, determined with reference to the wet rule.

The Commission will not, however, require that any refunds that are due from first sellers, as a result of recalculating section 110 costs under the wet rule, be made in conjunction with the refunds required in this proceeding. These refunds can be made in due time, without imposing any additional burdens of calculating and reporting on those affected by the stringent deadlines in this proceeding. However, first sellers and pipelines may include these refunds when implementing the offset procedures established in this order.

F. *Direct Sales*

Mississippi Chemical Corporation asks that the Commission reconsider its decision not to provide procedures for flowing the Btu refunds through to direct sale customers of interstate pipelines. Since rates to direct sale customers are established by contract and are not sub-

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[35] *INGAA, supra*, note 2, at 1.

ject to Commission approval, any entitlement of direct sale customers to a portion of the Btu refunds received by the pipelines depends on the terms of their contracts. The direct sales are not first sales under the NGPA.[36] Neither are they sales for resale under the Commission's Natural Gas Act jurisdiction.[37] The Commission believes that it lacks jurisdiction to require these pipelines to pass the Btu refunds on to their direct sales customers. The Commission also believes that direct sales customers are capable of enforcing their rights arising from their contracts with interstate pipelines by means of negotiation or in the courts. Accordingly, while the Commission recognizes that refunds to direct sales customers may be delayed or never made, there is no recourse that the Commission can provide.

G. *Refunds by Operators Designated by Large First Sellers*

The Commission wants to avoid confusion over when operators designated by large first sellers must make refunds. Hence, an operator designated by a large first seller must pay the large first seller's portion of the refund on the deadline for payment by large first sellers—regardless of whether the operator itself is a large or small first seller. In addition, a large first seller must remit its portion of the refund obligation to its designated operator who is a small first seller on or before the date the refund must be paid to the pipeline. The Commission is specifically requiring these first sellers to make the refunds with other large first sellers because large first sellers should not be allowed to take advantage

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[36] *See* 15 U.S.C. § 3301(21) (1982). Pipelines' sales of gas are not first sales except sales of gas produced by the pipeline. Public Service Comm'n of New York v. Mid-Louisiana Gas Co., 103 S. Ct. 3024 (1983).

[37] 15 U.S.C. § 717(b) (1982).

of a deferral that was designed to prevent cash flow problems for small first sellers.

H. *Extension of the Deadline For Payment by Large First Sellers*

The Producer group and other petitioners complain that compliance with the deadline for payment by large first sellers is an unreasonable hardship, and that the Commission acted arbitrarily by not permitting first sellers to spread out the payment of the Btu refunds. Specifically, petitioners state that the time period between the issuance of the final rule and the refund deadline is too short to ensure the computation and execution of accurate refunds and will cause unnecessary cash flow problems. They argue that these problems were made worse by the failure of the Commission to require pipelines to furnish the information necessary to calculate the Btu refunds in a timely fashion and the prospect that the Commission might permit an offset of section 110 costs and the Btu refund.

Petitioners also argue that any alternate relief from this burden was foreclosed by the Commission's statement in Order No. 399, that it "expects few applications" under section 502(c) of the NGPA and "is not inclined to grant them unless the applicant's claim for relief is supported by compelling reasons." Except to the extent that the deadline for payment by large first sellers is extended to December 31, 1984, to implement the offset mechanism, the Commission denies petitioners' requests.

First sellers have had sufficient time to prepare for the payment of this refund. *INGAA* was decided approximately a year ago. The Commission issued its interim rule on May 3, 1984. This rule established the refund procedures that were adopted with minor changes by Order No. 399 and it also stopped pipelines from unilaterally collecting the refunds owed by first sellers

through billing adjustments. Any uncertainty over whether the final rule would permit offsets of section 110 cost should not have stopped first sellers from calculating the refunds owed. These calculations would have to be made even if the Commission had permitted an offset procedure.

The Commission is troubled that some pipelines have failed to cooperate with first sellers in determining the amount of Btu refunds owed. This fact does not support across-the-board extensions of the refund deadlines.[38] In any event, those first sellers who have diligently sought cooperation should seek relief under NGPA section 502(c) if a pipeline has not cooperated in determining the amounts owed. In those individual cases, the Commission will, if appropriate, fashion a remedy to meet the needs of the parties.

I. *Royalty Payments*

Several petitions for rehearing were received on the obligation of first sellers to pay refunds on behalf of royalty interest owners. For example, Inland Ocean, Inc., (Inland) asserts that it may be unable to recover from its royalty interest owners and working interest owners their attributable portion of the Btu refund. Since there are bankruptcies and deaths associated with some royalty owners, Inland contends that it is virtually impossible to obtain refunds in many cases. Inland argues that equitable considerations would justify consideration of these factors and that the Commission should permit some form of equitable relief under section 502(c). In contrast, Pennzoil argues that the Commission should defer the royalty interest portion of the refund until that portion is paid by the royalty interest owner. In addition, Pitts

[38] The Commission reminds the pipelines that, although the first sellers are liable for the refunds, pipelines have an obligation under the Natural Gas Act as part of prudent management to ensure that first sellers pay these refunds promptly and properly.

Oil and other petitioners argue the the Commission should waive the refund attributable to royalty interest owners.

In Order No. 399, the Commission addressed the problems first sellers may have in recovering refunds from royalty owners. Though sympathetic, the Commission found it could not relieve the first seller of any refund obligation because to do so would sanction a price in excess of the NGPA ceiling price. Upon reconsideration, the Commission believes it has the discretion to waive a portion of the first seller's refund obligation, if it is demonstrated that the refund is uncollectible.[39] Although that order makes first sellers guarantors of the refund corpus paid to other parties, i.e., royalty owners or working interest owners, it may be impossible for a first seller to recoup all of these refunds. The Commission may consider requests for a waiver on a case-by-case basis.[40]

Mesa Petroleum states that they have received a letter from the Commissioner of Public Lands and Farm Loans of the State of Wyoming. According to Mesa, that letter represents a final statement by the State of Wyoming concerning the payment of gas royalties calculated on a "dry" basis and that Wyoming will begin lease cancellation proceedings for those leases that do not pay royalties on a dry basis.

The Commission has reviewed the letter sent by the State of Wyoming which Mesa attached as Appendix A to their comments. The letter raises a number of issues regarding the scheme of Federal regulation of the gas industry which are of concern to the Commission. However, without further clarification and development of those issues, the Commission is unable to comment further.

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[39] Consumer Federation of America v. FPC, 515 F.2d 347 (D.C. Cir. 1975).

[40] To the extent a filing fee exists for such a waiver, the Commission is waiving this filing fee.

III. *PAPERWORK REDUCTION ACT*

The refund reports required under Ordering Paragraphs Nos. F, G, H of this order and §§ 154.38(h)(3)(vi), (vii), and (viii) of the Commission's regulations are information collection requirements that are being submitted to the Office of Management and Budget (OMB) for its approval under the Paperwork Reduction Act, 44 U.S.C. 3501-3520 (1982) and OMB's regulations, 5 C.F.R. Part 1320 (1984). Comments on these provisions should be sent to the Office of Information and Regulatory Affairs of OMB (Attention: Desk Officer for the Federal Energy Regulatory Commission). Interested persons can obtain information on the information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 (Attention: Darrell D. Blakeway, (202) 357-8696).

IV. *EFFECTIVE DATE*

The Commission incorporates the reasoning and findings in the interim rule that good cause exists under the Administrative Procedure Act (APA), 5 U.S.C. § 553(b) (1982), for finding that a Notice of Proposed Rulemaking is unnecessary, impracticable and contrary to the public interest.

The Commission considered making this entire rule effective upon issuance. However, as a substantive matter, it makes little difference whether the entire rule is effective immediately or 30 days after publication in the *Federal Register*, because first sellers and pipelines are on notice that offsets will be required by December 31, 1984. Therefore, as provided under the APA, 5 U.S.C. § 553(d) (1982), this rule is effective 30 days after publication in the *Federal Register*, except as follows. For good cause, under § 553(d) of the APA, the Commission makes effective immediately: (1) an extension to December 31, 1984,

of all refunds by large first sellers; (2) repeal of the reporting requirements established in ordering paragraphs E, F, and G of Order No. 399, and (3) the requirements to file refund reports established in this order. By making the extension of the refund deadline and the rescission of the reporting requirements established in Order No. 399 effective upon issuance of this order, the Commission will reduce the burden on first sellers and pipelines by removing unnecessary requirements. Consequently, the Commission is revoking the requirements of its earlier stay, 49 Fed. Reg. 43,543 (Oct. 30, 1984), that refunds by large first sellers would be due 10 days after issuance of this order. The refund reports established in this rule are information collection requirements under the Paperwork Reduction Act and are subject to OMB approval. Accordingly, the refund reporting requirements (set forth in Ordering paragraph Nos. F, G, and H of this rule and §§ 154.38(h)(vi), (vii), and (viii) of the Commission's regulations) will become effective January 25, 1985. If OMB's approval and control number have not been received by this effective date, the Commission will issue a notice temporarily suspending the effective date of the refund reporting requirements.

III. *CONCLUSION*

To the extent petitioners raise other issues, the Commission believes that those issues were considered previously and were fully addressed in Order No. 399.

The Commission orders:

(A) Any first seller that collected revenues in excess of the product of (a) the applicable maximum lawful price established by the NGPA, and (b) the quantities of MMBtu's determined on the basis of § 270.204 of the Commission regulations, shall refund any such excess revenues. This refund shall be paid in full by December 31, 1984, unless the first seller is a small first seller, i.e., a

first seller that sold a total of ten million Mcf or less of gas, in both the interstate and intrastate markets, during 1983. A small first seller must pay the refunds in full by May 3, 1985, but, to qualify for this extension, he must notify in writing, by December 31, 1984, any pipeline to which he owes refunds that he is a small first seller. To the extent that revenues for gas sold in a first sale under the NGPA are less than or equal to the level of revenues based on the product of (a) and (b), and are contractually authorized, no refunds are due.

(B) All first sellers may defer payment of that portion of the Btu refund attributable to royalty interest owners until the first seller receives payment from the royalty interest owner or November 5, 1986, whichever occurs first. First sellers deferring the portion of Btu refunds attributable to royalty interest owners must notify pipelines of the deferral by the date that the first seller would otherwise be required to make the refund.

(C) Any filing fee applicable to a request for a waiver, as described herein, is waived.

(D) The parties to the first sale transaction may choose the method of payment of this refund. If the parties cannot agree to a method, payment shall be by a lump-sum cash payment. However, to the extent that a pipeline-purchaser and first seller agree on an amount of section 110 allowances owed by the pipeline to the first seller, such amount shall be offset against the amount of the Btu refund due to the pipeline. No amounts owing under section 110 which accrued after January 19, 1984, or which the pipeline disputes, may be used to offset any Btu refund amounts.

(E) Interest on Btu refunds shall be calculated in accordance with § 154.102(c) and (d) of the Commission's regulations, except that the interest obligation for money paid into escrow is that interest which accrued in the escrow account on the amount required to be refunded.

Interest on section 110 allowance retroactive payments shall be calculated pursuant to the contract under which such allowances were charged and collected.

(F) By February 15, 1985, interstate and intrastate pipelines shall file a refund report with the Commission detailing (1) those first sellers who made refunds, and the refund amounts that the pipeline has received, separately stated for each first seller, and indicating the principal amount and interest; and (2) those first sellers who have not made refunds, and the refund amounts due but not received by the pipeline, for each first seller, separately stating the principal amount and interest due from each first seller, and the reason for nonpayment, and (3) in the case where Btu refund amounts have been offset by section 110 allowances for past periods owed to the first sellers by the pipelines, and where the offsets are made under paragraph (D) above, the refund report should identify the first sellers who have applied offsets to satisfy Btu refunds, the amount of Btu refunds due, for each first seller, stating separately the principal and interest, and a statement of concurrence on the Btu refund due and the section 110 offset amount. For interstate pipelines using the offset mechanism, the following information must also be supplied:

a) The amount of section 110 allowances applied to the Btu refund obligations which are agreed to by both the pipeline and first seller, and

b) On a well by well or completion location basis, the amount per MMBtu of section 110 charges which have been applied to a Btu refund obligation, the specified production-related services for which the charge is made, and the contractual provisions expressly authorizing the section 110 charge.

Of those first sellers who are small first sellers as defined in this order, only those who have paid in full need to be identified. Intrastate pipelines shall also file a copy

of the report with the State regulatory agency having jurisdiction over such pipeline.

(G) By June 17, 1985, intrastate and interstate pipelines shall file a refund report containing the information described in paragraph (F), with respect to refunds not previously identified in the prior refund report. Intrastate pipelines shall also file this report with the State regulatory agency having jurisdiction over such pipeline.

(H) By January 5, 1987, intrastate and interstate pipelines shall file a refund report with the Commission detailing (1) those first sellers who have made refunds after May 3, 1985, and the refund amounts received from these sellers, separately stating the principal and interest received; and (2) those first sellers who have not made refunds or refunds in full, the refund amounts not made by each first seller, separately stating the principal and interest due from each first seller, and the reason for non-payment. Intrastate pipelines shall file a copy of this report with the state regulatory agency having jurisdiction over such pipeline.

(I) The reporting requirements established in ordering paragraphs E, F, and G of Order No. 399 are rescinded.

(J) The regulations in Part 154, Subchapter E. Chapter I, Title 18, *Code of Federal Regulations* are amended as set forth below.

By the Commission. Chairman O'Connor dissented in part as to Part III. C.

[SEAL] Commissioner Sousa dissented in part as to Part III. C.

Commissioner Richard dissented in part as to Part III. I. with a separate statement attached.

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

1. The authority citation for Part 154 continues to read as follows:

Authority: Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1982); Executive Order 12,009, 3 C.F.R. 142 (1978); Administrative Procedure Act, 5 U.S.C. §§ 551-557 (1982); Natural Gas Act, 15 U.S.C. §§ 717-717w (1982); Federal Power Act, 16 U.S.C. §§ 791a-828c (1982); Natural Gas Policy Act 15 U.S.C. §§ 3301-3432 (1982); Public Utility Regulatory Policies Act, 16 U.S.C. § 2601-2645 (1982); Interstate Commerce Act, 49 U.S.C., 1-27 (1976).

2. Section 154.38(h)(2) is amended by adding a new sentence at the end of the paragraph to read as follows:

§ 154.38 *Composition of rate schedule.*

* * * *

(h) *Pipeline recovery of Btu measurement adjustments.*

* * * *

(2) * * *

Btu refunds shall be reduced by section 110 costs which have been offset in accordance with Order No. 399-A.

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3. Section 154.38(h)(3)(vi) is amended by removing the words "December 18, 1984." and adding, in their place, the words "February 15, 1985".

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RM84-6-003, *et al.*

REFUNDS RESULTING FROM BTU
MEASUREMENT ADJUSTMENTS

(Issued November 20, 1984)

RICHARD, Commissioner, *dissenting* in part:

I strongly agree with my two colleagues as to the offset procedures. I must, however, regrettably dissent as to that portion of the Order not allowing an upfront mechanism dealing with a waiver of *uncollectible* royalty and working interest dollars. My dissent is concerned with the timing of any waiver, as set out in Part III. I.

I believe that the Commission should consider those limited circumstances (less than five percent of the total) where a first seller *cannot recover* the amounts passed through to working interest or royalty owners. In this case the first seller acting as a conduit never received the benefit of the monies received from consumers.

It is without question that no refund mechanism will ever completely restore the full status *quo ante*. At best, the Commission can establish a refund procedure which fairly balances questions of equity and the public interest and which substantially complies with court ordered refunds in *INGAA*. In establishing that mechanism, the Commission must consider the relevant factors, the practical consequences in making the refund determination, and strike a balance between the comparative benefits and losses.[1]

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[1] See FPC v. Tennessee Gas Co., 371 U.S. 145, 155 (1962); Public Service Commission v. FPC, 329 F.2d 242, 250 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 963 (1964); Wisconsin Electric Power Co. v. FERC, 602 F.2d 452, 457 (D.C. Cir. (1979)).

This is not to say someone should not be held liable for the overcharges. However, it is to say that not every decision invalidating an agency order should be given full retroactive effect. The Commission should recognize that difficulties associated with the refund process are due, in part, to our erroneous interpretation of the NGPA that the Court corrected. First sellers have relied on that erroneous interpretation. Now the Commission is faced with the responsibility of undoing a pricing practice that has been in effect for over six years. In so doing, it should consider the public interest and the equities of all those affected by the refund process. Consumers are entitled to credits based on the overcharge plus the prime interest rate. Those parties that received the benefit of the overcharge are the ones required to fund the credit. My concern is with those amounts uncollectible by first sellers who never received the benefit of their collection from consumers.

In line with my earlier dissent, I would establish two procedures by which first sellers may seek relief from their uncollectible royalty and working interest refund obligations. Neither of these procedures would be available if these parties and the first seller are under a contractual relationship regarding any well from which gas is or will be flowing. If the first seller is paying royalties or working interest amounts to these interests on flowing gas, then the Commission would presume the first seller may collect the refund amounts through billing adjustments.[2]

I would limit the first procedure to small first sellers.[3] As stated in the final rule, the Commission is concerned

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[2] Questions of contractual authority to make adjustments should be resolved by the individual parties to the contract.

[3] *See* 49 Fed. Reg. 37735, 37737-8 (Sept. 26, 1984). Small first sellers are first sellers of gas who have sold a total 10 million Mcf (10 Bcf) or less of gas in both the intrastate and interstate

that these sellers may experience cash flow problems in making refund payments as well as financial in their pursuance.

We should recognize that in some cases, refunds from royalty and working interest owners simply cannot be obtained. In these cases, I recommended the establishment of a waiver procedure by which small first sellers may notify the Commission of such impossibility on or before the deadline for making such payments. This procedure is available only if the total refund from a particular interest is less than or equal to $100. Receipt of the notification by the Commission will constitute a waiver of the refund and does not require issuance of any document by the Commission, i.e., it will be self-implementing. However, in order to encourage the collection, notification must be made under oath signed by the first seller and must be served on the pipeline. The affidavit should further state the owner qualifies as a small first seller, the amount of the refund owed, why the refund is uncollectible, what steps the first seller has taken to collect the refund, and that such steps were made in good faith to obtain the refund, but that it is impossible to obtain the refund. The following examples illustrate several situations where it may be impossible to collect the refund:

1. the royalty owner has died and his estate has closed.

2. the royalty owner is bankrupt and the bankruptcy proceeding has closed.

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markets in 1983. As a matter of course, cash flow problems are much more likely to exist in the case of small producers than large ones. For over seven years, I have followed the issue of who drills the most *exploratory* wells and I am convinced that consistently independent producers *do* drill at least 80% of those wells each year. My upfront waiver is largely to remove any cloud over the financial statement of the producer. Internally generated funds are less available for drilling new wells to this class of producer.

3. the royalty owners cannot be located with proof that reasonable steps were undertaken to locate.

4. the applicable state Statute of Limitations prohibits legal action against the royalty owner to obtain such refunds.

The Commission audit division would review these submissions, Submissions containing false or incorrect statements or those that do not fully justify the impossibility of collecting the refunds would be dealt with under the Commission's enforcement authority.

Finally, some refunds may not qualify for the waiver procedures described above because it still may not be cost effective for the first seller to pursue the refund. Since extraordinary situations may exist for both large and small first sellers, a second procedure would be available to any first seller.

Accordingly, for these interest owner refunds exceeding $100, the first seller should first make a good faith effort to obtain the refund from the interest owner. If the refund is unobtainable a first seller may file for a section 502(c) adjustment of the refund liability explaining why it would not be cost effective to pursue the refund. Such application would be filed in accordance with Subpart K of Part 385 of the Commission's regulation and be filed with the Commission and the pipeline no later than the final due date of the refund. The filing of such application would suspend the obligation to make the refund payment until such time as the Commission acts on that application.

I agree with the majority's waiver of the $6000 filing fee for section 502(c) applications.

I believe these procedures outlined above comply with the court's decision in INGAA, and also balance the competing interests of administrative burdens and practicalities associated with obtaining refunds with equity and the

public interest. Since my colleagues think otherwise, I respectfully dissent from that portion of the decision dealing with the timing of the waiver issue.

/s/ Oliver G. Richard III
OLIVER G. RICHARD III
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

(18 C.F.R. Part 154)

Docket Nos. RM84-6-003
through RM84-6-014

REFUND RESULTING FROM BTU
MEASUREMENT ADJUSTMENT

ERRATUM NOTICE

(November 30, 1984)

ORDER NO. 399-A

ORDER GRANTING IN PART AND
DENYING IN PART REHEARING

(Issued November 20, 1984)

Page 48, following "By the Commission," should read:

Chairman O'Connor dissented in part as to Part III. C.

Commissioner Sousa dissented in part as to Part III. C. with a separate statement to be issued later.

Commissioner Richard dissented in part as to Part III. I. with a separate statement attached.

KENNETH F. PLUMB
Secretary

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners:

Raymond J. O'Connor, Chairman;
Georgiana Sheldon, A. G. Sousa,
Oliver G. Richard III and Charles G. Stalon.

Docket Nos. RM84-6-016
through RM84-6-026

REFUNDS RESULTING FROM BTU
MEASUREMENT ADJUSTMENTS

ORDER GRANTING REHEARING FOR THE
PURPOSE OF FURTHER CONSIDERATION

(Issued January 11, 1985)

Order No. 399 (the Btu refund rule)[1] implemented the decision of the United States Court of Appeals for the District of Columbia Circuit in *Interstate Natural Gas Association of America* v. *Federal Energy Regulatory Commission (INGAA)*[2] by requiring all first sellers to make refunds resulting from the court-ordered adjustment in the method used to measure the energy content of natural gas. Order No. 399-A amended Order No. 399 to require the offset of Btu refunds and production-related costs under section 110 of the Natural Gas Policy Act of 1978 (NGPA), to assert the authority of the Commission to waive refunds that are uncollectible from royalty interest owners, to extend the deadline for large

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[1] Refund Resulting from Btu Measurement Adjustment, Final Rule, 49 Fed. Reg. 37,735 (Sept. 26, 1984) (issued Sept. 20, 1984).

[2] 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1616 (1984).

first sellers to make the Btu refunds, and to modify the reporting requirements.[3]

The Commission received nine timely requests for rehearing.[4] The Commission also received four requests for extension of the December 31, 1984 deadline for large first sellers to make the Btu refunds.[5] A motion was filed requesting a modification in the method of offsetting Btu refunds and section 110 billings.[6] Five of the petitioners for rehearing sought a stay of Order No. 399-A until after a ruling on their petitions.[7] The Commission grants rehearing solely for the purpose of further consideration, so that none of the requests is deemed denied by operation of law, and to afford ample opportunity to assess all of the issues raised. The Commission is not granting or denying any petitions on the merits;[8] nor is the Commission determining whether any of the peti-

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[3] Refunds Resulting from Btu Measurement Adjustment, Order Granting in part Rehearing, 49 Fed. Reg. 46,353 (Nov. 26, 1984) (issued Nov. 20, 1984).

[4] American Paper Institute, Inc. (API), Industrial Users (*i.e.*, Process Gas Consumers Group and American Iron & Steel Institute), Florida Cities, Pitts Oil Company, *et al.*, Stauffer Chemical Company, Associated Gas Distributors (AGD), Memphis Light, Gas & Water Division, BTA Oil Producers, and a group of indicated producers (Producers).

[5] The extension was sought by United Gas Pipe Line Company (United) and Southern Natural Gas Company. United's request was supported by Columbia Gas Transmission Corporation and Transcontinental Gas Pipe Line Corporation (Transco).

[6] This request was made by Transco.

[7] Associated Gas Distributors (AGD), the Florida Cities, Pitts Oil Company, *et al.*, Industrial Users and the American Paper Institute, Inc. (API).

[8] Some of the filings were labeled motions. However, motions may not be filed in an informal rulemaking proceeding such as this. 18 C.F.R. § 385.212(a)(3) (1984). The Commission is treating these motions as petitions for reconsideration.

tions raise issues that are properly the subject of a petition for rehearing.

The Commission orders:

Rehearing of Order No. 399-A is granted for the limited purpose of further consideration. As provided in Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (1984), no answers to the requests for rehearing will be entertained by the Commission.

By the Commission.

[SEAL]

/s/ Kenneth F. Plumb
KENNETH F. PLUMB
Secretary

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

MOBIL OIL CORPORATION, et al.,
GENERAL AMERICAN OIL COMPANY OF TEXAS,
PHILLIPS PETROLEUM COMPANY,
PENNZOIL COMPANY,
MISSISSIPPI RIVER TRANSMISSION CORP.,
SHELL OIL COMPANY,
EXXON CORPORATION,
LACLEDE GAS COMPANY,
GETTY OIL COMPANY,
LOUISIANA LAND & EXPLORATION COMPANY,
ASSOCIATED GAS DISTRIBUTORS,
NORTHERN NATURAL GAS COMPANY,
TEXAS GAS TRANSMISSION CORPORATION,
TEXACO, INC.,
TENNECO OIL COMPANY,
HOUSTON OIL AND MINERALS CORPORATION,
GULF OIL CORPORATION,
PLACID OIL COMPANY,
AMINOIL, USA, INC., et al.,
Intervenors

And Consolidated Case Nos. 81-1680, 81-1691, 81-1692, 81-1696, 81-1802, 82-1004 and 82-1177

[Filed Mar. 5, 1985]

Before: ROBINSON, Chief Judge, MIKVA and SCALIA, Circuit Judges.

ORDER

Upon consideration of the motion of petitioner Associated Gas Distributors to enforce this Court's mandate in the captioned cases and of the various responses thereto, and of petitioner's reply, and this Court having reviewed the record and the pleadings herein and having heard oral argument on the motion, it is

ORDERED, by the Court, that the motion by Associated Gas Distributors to direct compliance with the Court's mandate herein is granted and the Federal Energy Regulatory Commission is directed to vacate the offset portion of its Order No. 399-A, for the reasons set forth in its own order No. 399, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

v.

FEDERAL ENERGY REGULATORY COMMISSION
And Consolidated Cases

[Filed May 6, 1985]

Before: ROBINSON, Chief Judge, MIKVA and SCALIA, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of the Interstate Natural Gas Association of America, the "Indicated Producers," and the Federal Energy Regulatory Commission, it is

ORDERED, by the Court, that the aforesaid petitions are denied.

Per Curiam

FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Circuit Judge Scalia would grant the petitions for rehearing, and accordingly replaces his original concurrence with the attached dissent.

SCALIA, *Circuit Judge*, dissenting:

Regardless of whether it was arbitrary, capricious, or otherwise unlawful for the Commission to provide for the set-off here challenged (a matter on which I express no opinion), that action did not contravene our order in *Interstate Natural Gas Ass'n of America v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1615 (1984). That order merely directed the Commission to vacate its rule regarding the manner of computing gas volume, *see* 18 C.F.R. § 270.204 (1983), which the Commission has done. *See Interpretative Rule for Btu Measurement Standard Under the Natural Gas Policy Act*, 49 Fed. Reg. 3072 (1984) (codified at 18 C.F.R. § 270.204 (1984)). Even if it be true that a failure to make the prompt refunds that are legally required as a result of vacating the rule would justify mandamus, the Commission retains discretion to determine both the amount and the manner of refund, and appeal rather than mandamus is the only permissible means of asserting that that discretion has been abused. *See Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979); *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895); *Gaines v. Rugg*, 148 U.S. 228, 239 (1893).

Nor do I believe that the case is properly before us as a petition for review, *see* 15 U.S.C. § 3416(a)(2) (1982). And even if it were, I would conclude that the only proper forum for review of Order No. 399-A is the Fifth Circuit. Title 28 U.S.C. § 2112(a) (1982) provides:

> If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency . . . concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed.

Before the present motion was brought before us, a petition for review of Order No. 399 was filed in the Fifth Circuit, *see Mobil Oil Exploration & Producing Southeast, Inc. v. FERC*, No. 84-4775 (5th Cir. filed Nov. 20, 1984). The petitioners in that case challenged those aspects of Order No. 399 finding that refunds were due and prescribing a formla for their computation—which aspects were *affirmed* upon reconsideration in Order No. 399-A. The present petitioners challenge those aspects of Order No. 399-A which *revised* Order No. 399 upon reconsideration so as to require the refunds to be made where possible by offset rather than lump-sum cash payment. While for purposes of determining the necessity of filing a petition for reconsideration before seeking review, *see* 15 U.S.C. § 3416(a)(2), it may be necessary to consider Order No. 399 (requiring cash refunds) and Order No. 399-A (requiring set-offs instead) to be separate orders, *see Public Service Comm'n of New York v. FPC*, 543 F.2d 757, 775 n.116 (D.C. Cir. 1974); *Utah Power & Light Co. v. FPC*, 339 F.2d 436, 437-38 (10th Cir. 1964), for purposes of effectuating congressional intent in placing review of "the same order" in a single court it seems to me clear that this entire proceeding is one. It makes no sense to review in one court those portions of the proceedings (if indeed it is possible to separate them) determining whether and in what amounts refunds are due, and in another court those portions determining the manner in which the refunds are to be effected. While the agency did not in this instance file the record with the Fifth Circuit, the statutorily prescribed act which has the effect of precluding other courts from entertaining later-filed petitions, *see* 28 U.S.C. § 2112(a), that court had permitted the omission only because of the representation that a subsequently filed mandamus motion (*not* a subsequently filed petition for review) was pending before us. *See* Motion of the Federal Energy Regulatory Commission to Postpone the Filing of the Certificate of Record, *Mobil Oil Explora-*

tion, supra (Dec. 28, 1984). Once we determine (as we should) that mandamus is unavailable, even if we impermissibly recharacterize the petition for mandamus as an appeal, it is still the *second* appeal, and precedence must be given to the earlier appeal filed in the Fifth Circuit. The majority's action frustrates the Congressional policy of preventing piecemeal review and placing review in the court of first filing. If we do not dismiss this case as a meritless petition for mandamus (as we should), we must transfer the so-called appeal to the Fifth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

v.

FEDERAL ENERGY REGULATORY COMMISSION
And Consolidated Cases

[Filed May 15, 1985]

Before: ROBINSON, Chief Judge, WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of the "Indicated Producers", Interstate Natural Gas Association of America and the Federal Energy Regulary Commission have been circulated to the full Court and no member has requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the aforesaid suggestions are denied.

Per Curiam

FOR THE COURT

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Wright, Tamm and Bork did not participate in this order.

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
600 Camp Street
New Orleans, LA 70130

GILBERT F. GANUCHEAU
Clerk

January 16, 1985

MEMORANDUM TO COUNSEL OR
PARTIES LISTED BELOW:

No. 84-4775

MOBIL OIL

v.

FERC

The following action has been taken in the above case:

[XX] AN EXTENSION OF TIME has been granted to and including

30-DAYS AFTER DISTRICT OF COLUMBIA CIRCUIT RULES ON THE MOTIONS FOR COMPLIANCE WITH ITS MANDATE . . .

[XX] for filing certificate of record . . . .

GILBERT F. GANUCHEAU
Clerk

By: /s/ [Illegible]
Deputy Clerk

TO ALL COUNSEL OF RECORD

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4775

MOBIL OIL EXPLORATION & PRODUCER SOUTHEAST,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

[Filed Mar. 27, 1985]

Petition for Review of an Order of the
Federal Energy Regulatory Commission

GARZA, HIGGINBOTHAM and DAVIS, Circuit Judges.

BY THE COURT:

A motion has been filed by Mobil and others to direct the commission to immediately file the record with the clerk of this court. The motion is DENIED. Movers may reurge their motion after the D.C. Circuit rules on pending motions for reconsideration of its March 5, 1985 ruling. Within fifteen days following a ruling by the D.C. Circuit on the pending motions for reconsideration, AGD shall supplement its memorandum in support of its motion to transfer this appeal to the D.C. Circuit by specifying the issues remaining for decision and describing how these remaining issues relate, if at all, to the issue decided by the D.C. Circuit. Any party wishing to respond to the memorandum of FERC shall do so within fifteen days of receipt of FERC's memorandum.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4775

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Petitioner,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

[Filed Mar. 27, 1985]

Petition for Review of an Order of the
Federal Energy Regulatory Commission

ORDER:

Pending a determination of whether the issues remaining for decision in this case will be submitted to this court or the U.S. Court of Appeals for the D.C. Circuit;

IT IS ORDERED that the January 16, 1985 order requiring that the record be lodged in this court on April 4, 1985, is recalled.

/s/ W. Eugene Davis
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4775

MOBIL OIL EXPLORATION &
PRODUCING SOUTHEAST, INC., ET AL.,
Petitioners,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

[Filed Mar. 27, 1985]

Petition for Review of an Order of the
Federal Energy Regulatory Commission

ORDER:

IT IS ORDERED that the January 16, 1985, order requiring that the record be lodged in this Court on April 4, 1985, is recalled.

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX E

STATUTORY PROVISIONS

Natural Gas Policy Act of 1978, 15 U.S.C. § 3301, *et seq.*

Sections 506(a)-(b), 15 U.S.C. §§ 3416(a)-(b):

§ 3416. Judicial review

(a) Orders.—

(1) In general.—The provisions of this subsection shall apply to judicial review of any order, within the meaning of section 551(6) of Title 5 (other than an order assessing a civil penalty under section 3414(b)(4) of this title or any order under section 3362 of this title or any order under section 3363 of this title), issued under this chapter and to any final agency action under this chapter required to be made on the record after an opportunity for an agency hearing.

(2) Rehearing.—Any person aggrieved by any order issued by the Commission in a proceeding under this chapter to which such person is a party may apply for a rehearing within 30 days after the issuance of such order. Any application for rehearing shall set forth the specific ground upon which such application is based. Upon the filing of such application, the Commission may grant or deny the requested rehearing or modify the original order without further hearing. Unless the Commission acts upon such application for rehearing within 30 days after it is filed, such application shall be deemed to have been denied. No person may bring an ac-

tion under this section to obtain judicial review of any order of the Commission unless—

(A) such person shall have made application to the Commission for a rehearing under this subsection; and

(B) the Commission shall have finally acted with respect to such application.

For purposes of this section, if the Commission fails to act within 30 days after the filing of such application, such failure to act shall be deemed final agency action with respect to such application.

(3) Authority to modify orders.—At any time before the filing of the record of a proceeding in a United States Court of Appeals, pursuant to paragraph (4), the Commission may, after providing notice it determines reasonable and proper, modify or set aside, in whole or in part, any order issued under the provisions of this chapter.

(4) Judicial review.—Any person who is a party to a proceeding under this chapter aggrieved by any final order issued by the Commission in such proceeding may obtain review of such order in the United States Court of Appeals for any circuit in which the party to which such order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. Review shall be obtained by filing a written petition, requesting that such order be modified or set aside in whole or in part, in such Court of Appeals within 60 days after the final action of the Commission on the application for rehearing required under paragraph (2). A copy of

such petition shall forthwith be transmitted by the clerk of such court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court deems proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive. The Commission shall also file with the court its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such

order of the Commission, shall be final subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(5) Orders remain effective.—The filing of an application for rehearing under paragraph (2) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under paragraph (4) shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(b) Review of rules and orders.—Except as provided in subsections (a) and (c) of this section, judicial review of any rule or order, within the meaning of section 551(4) of Title 5, issued under this chapter may be obtained in the United States Court of Appeals for any appropriate circuit pursuant to the provisions of chapter 7 of Title 5, except that the second sentence of section 705 thereof shall not apply.

United States Code

All Writs Act, 28 U.S.C. § 1651:

§ 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 2112:

§ 2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed.

For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or, after a prehearing conference, upon its own motion may by order in any such proceeding designate to be included therein. Such a stipulation or order may provide in an appropriate case that no record need be filed in the court of appeals. If, however, the correctness of a finding of fact by the agency, board, commission, or officer is in question all of the evidence before the agency, board, commission, or officer shall be included in the record except such as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court agree to omit as

wholly immaterial to the questioned finding. If there is omitted from the record any portion of the proceedings before the agency, board, commission, or officer which the court subsequently determines to be proper for it to consider to enable it to review or enforce the order in question the court may direct that such additional portion of the proceedings be filed as a supplement to the record. The agency, board, commission, or officer concerned may, at its option and without regard to the foregoing provisions of this subsection, and if so requested by the petitioner for review or respondent in enforcement shall, file in the court the entire record of the proceedings before it without abbreviation.

(c) The agency, board, commission, or officer concerned may transmit to the court of appeals the original papers comprising the whole or any part of the record or any supplemental record, otherwise true copies of such papers certified by an authorized officer or deputy of the agency, board, commission, or officer concerned shall be transmitted. Any original papers thus transmitted to the court of appeals shall be returned to the agency, board, commission, or officer concerned upon the final determination of the review or enforcement proceeding. Pending such final determination any such papers may be returned by the court temporarily to the custody of the agency, board, commission, or officer concerned if needed for the transaction of the public business. Certified copies of any papers included in the record or any supplemental record may also be returned to the agency, board, commission, or officer concerned upon the final determination of review or enforcement proceedings.

(d) The provisions of this section are not applicable to proceedings to review decisions of the

Tax Court of the United States or to proceedings to review or enforce those orders of administrative agencies, boards, commissions, or officers which are by law reviewable or enforceable by the district courts.

Federal Power Act, 16 U.S.C. § 791, *et seq.*

Sections 313(a)-(b), 15 U.S.C. §§ 825*l*(a)-(b):

§ 825*l*. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in

such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new find-

ings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

Natural Gas Act, 15 U.S.C. § 717, *et seq.*

Sections 19(a)-(b), 15 U.S.C. §§ 717r(a)-(b):

§ 717r. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order

made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be addduced upon the hearing in such a manner and upon such terms and conditions

as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

APPENDIX F

LIST OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES REQUIRED BY RULE 28.1

Pursuant to Rule 28.1, Petitioners list their parent companies, subsidiaries (other than wholly owned subsidiaries), and affiliates. This list is limited to entities with stock or debt securities publicly traded in the United States or Canada:

AMOCO PRODUCTION COMPANY

Amoco Production Company is a wholly owned subsidiary of Amoco Corporation.

The subsidiaries and affiliates (not wholly owned by Amoco Corporation or a wholly owned subsidiary) of Amoco Production Company are:

Amoco Australia Limited
Amoco Canada Petroleum Company, Ltd.
Amoco Credit Corporation
Amoco Oil Holdings S.A.
Amoco (U.K.) Exploration Company
Analog Devices Inc.
Cetus Corporation
Cyprus Mines Corporation

ARCO OIL AND GAS COMPANY

ARCO Oil and Gas Company is a division of Atlantic Richfield Company.

The subsidiaries and affiliates (not wholly owned) of Atlantic Richfield Company are:

Alyeska Pipeline Service Company
Anaconda-Ericsson Inc.
Anamax Mining Company
Atlantic Richfield de Mexico, S.A. de C.V.
Aughinish Alumina, Ltd.

Aughinish Estates
Aughinish Finance, Ltd.
Badger Pipe Line Company
Bingham Development Company
Black Lake Pipe Line Company
Blair Athol Coal Pty., Limited
Caribou-Chaleur Bay Mines Ltd.
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Delaware Bay Transportation Company
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Eisenhower Mining Company
Flower Street Limited
F.T.L. Company Limited
Gravity Adjustment, Inc.
Hardy Oil Company
Hydrokem Performance Chemicals Company
Imperial Eastman de Mexico, S.A.
Iricon Agency Ltd.
Jamaica Alumina Security Company Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Lavan Petroleum Co.
Mayflower Mining Company
R. W. Miller (Holdings) Limited
Minera Anaconda Limitada
Montoro, Empress Para La Industria Quimica
New Bingham Mary Mining Company
Nihon Oxirane Company, Ltd.
Oil Shippers Service, Inc.
P.T. Arutmin Indonesia
Park Cummings Mining Company
Park Premier Mining Company
Participaciones Mexicanas, S.A. de C.V.
Platte Pipe Line Company
Productos Especiales Metalicos, S.A.

Sinclair Venezuelan Oil Company
Smoke House Copper Mining Company
Solvamex, S.A. de C.V.
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company
Trans Mountain Oil Pipe Line Company
West Mayflower Mining Company
William Prym de Mexico S.A.

CHAMPLIN PETROLEUM COMPANY

The parent companies and subsidiaries and affiliates of Champlin Petroleum Company are:

Alameda Belt Line
The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
The Belt Railway Company of Chicago
Brownsville & Matamoros Bridge Company
Camas Prairie Railroad Company
Central California Traction Company
Chicago and Western Indiana Railroad Company
The Denver Union Terminal Railway Company
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
Oakland Terminal Railway
The Ogden Union Railway and Depot Company
Portland Terminal Railroad Company
Portland Traction Company
The Pueblo Union Depot and Railroad Company
St. Joseph Terminal Railroad Company
Southern Illinois and Missouri Bridge Company
Stauffer Chemical Company of Wyoming

Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Uinta Development Company
Union Pacific Corporation
Union Pacific Resources Ltd.

CHEVRON U.S.A. INC.

Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation.

The subsidiaries and affiliates (not wholly owned) of Chevron Corporation are:

AMAX, Inc.
American Overseas Petroleum Limited
Caltex Petroleum Companies
Huntington Beach Company
Irving Oil Limited
Kenai Pipe Line Company
Plantation Pipe Line Company

CONOCO INC.

Conoco Inc. is a wholly owned subsidiary of E.I. du Pont de Nemours and Company.

The subsidiaries and affiliates (not wholly owned) of Conoco Inc. are:

Cit-Con Oil Corporation (Delaware)
Conch International Methane Ltd. (Bahama Islands)
Conch L.N.G. (New Jersey)
Conoco Exploration, Ltd. (Delaware)
Bishop Coal Company (Delaware)
Conrhein Coal Co. (Partnership)
Cardinal River Coals, Ltd. (Alberta, Canada)
Neptune Bulk Terminals (Canada) Ltd. (Canada)
Contochu Inc. (Delaware)
Harmar Coal Co. (West Virginia)

Itmann Coal Co. (Pennsylvania)
Tongue River Railroad (Partnership)
Oasis Oil Co. of Libya, Inc. (Delaware)
Colonial Pipeline Company (Delaware)
Dixie Pipeline Company (Delaware)
Explorer Pipeline Company (Delaware)
Lake Charles Pipe Line Company (Delaware)
Pioneer Pipe Line Company (Delaware)
Platte Pipe Line Company (Delaware)
Seadock, Inc. (Texas)
Texas Offshore Port, Inc. (Delaware)
West Shore Pipe Line Company (Delaware)
Yellowstone Pipe Line Company (Delaware)
Kettleman North Dome Assoc. (California)
Maritime Protection, Inc. (New York)
Oil Shippers Service, Inc. (Delaware)
Petroleum Terminals, Inc. (Indiana)
Iricon Agency, Ltd. (Delaware)
Southern Facilities, Inc. (Delaware)
The Standard Shale Products Company (Colorado)

EXXON CORPORATION

The subsidiaries and affiliates (not wholly owned) of Exxon Corporation are:

Exxon Pipeline Company
Imperial Oil Limited
Reliance Electric Company

GETTY OIL COMPANY

Getty Oil Company has no subsidiaries or affiliates which are not wholly owned.

GULF OIL CORPORATION

The subsidiaries and affiliates (not wholly owned) of Gulf Oil Corporation are:

A/S Jargul
A/S Jargul and Co. K/S

AB Djurgardsberg
Adela Investment Company, S.A.
Allied—General Nuclear Service
Andogas S.A. (Switzerland)
Asia Polymer Corp.
China Gulf Oil Company Limited
Chinhae Chemical Company, Ltd.
Colonial Pipeline Company
Delaware Bay Transportation Company
Det Gronlandske Olieaktieselskab
Dixie Pipeline Company
Emery Joint Venture
Explorer Pipeline Company
Forenade Svenska Oljeimportorers AB
Gulf Canada Limited
Gulf Oil Canada Limited Associated Companies
Gulf Oil Corporation Erisa
Gulf Oil Terminals (Ireland) Limited
Gulf Oil Zaire S.A.R.L.
Harshaw—Juarez S.A. de C.V.—H/FP
Harshaw Galvanotecnia S.A.—H/FP
Harshaw-Bryce & Co. Pty. Ltd.—H/FP
Harshaw-Murata Kabushiki Kaisha—H/FP
Harshaw/Filtrol Partnership—H/FP
Hochtemperatur Reaktorbeau GMBH
Insco Holding & Finance Company N.V.
Keydril (Nigeria) Limited
Kuwait Oil Company Limited
Laurel Pipe Line Company
Mainline Pipelines Limited
Mid-Valley Pipeline Company
Midwest Carbide Corporation
North River Energy Company
Oil Shippers Service, Inc.
Oklahoma Nitrogen Company
Paloma Pipe Line Company
Pembroke Capital Company
Pembroke Cracking Company

Petrosil Oil Company Limited
Plastigama, S.A.
Plastijal Sociedad Anonima
Platte Pipeline Company
Pyropower Corporation
Raffinerie de Cressier S.A.
Rio Blanco Oil Shale Partnership
Sarni S.P.A.—Refining
Solvent Refined Coal International, Inc.
Sunrise International Company Limited
Svensk Petroleum Administration A.B.
Svensk Petroleum Largring Tre A.B.
Svenska Petroleum Forvalting A.B.
Taita Chemcial Corporation
Valley Pines Associates
Venezuela Gulf Refining Company
West Texas Gulf Pipe Line Company

MOBIL OIL CORPORATION; MOBIL OIL EXPLORATION AND PRODUCING SOUTHEAST INC.; MOBIL PRODUCING TEXAS AND NEW MEXICO, INC.; AND THE SUPERIOR OIL COMPANY

Mobil Oil Corporation is a wholly owned affiliate of Mobil Corporation. Mobil Oil Exploration and Producing Southeast, Inc. and Mobil Producing Texas and New Mexico, Inc. are wholly owned affiliates of Mobil Oil Corporation. The Superior Oil Company is a wholly-owned affiliate of Mobil Corporation.

The subsidiaries and affiliates (not wholly owned) of Mobil Oil Corporation are:

Falconbridge Limited
McIntyre Mines Limited
Marcor Inc.
Mobil Alaska Pipeline Company
Montgomery Ward & Co., Incorporated
Montgomery Ward Credit Corporation
Toa Nenryo Kogyo Kabushiki Kaisha

MONSANTO OIL COMPANY

Monsanto Oil Company is a wholly owned subsidiary of Monsanto Company.

PENNZOIL COMPANY

The subsidiaries and affiliates (not wholly owned) of Pennzoil are:

Eureka Pipe Line Company
National Transit Company
Pennesco, Inc.
Proven Properties, Inc.

PHILLIPS PETROLEUM COMPANY AND PHILLIPS OIL COMPANY

Phillips Oil Company is a wholly owned subsidiary of Phillips Petroleum Company.

The subsidiaries and affiliates (not wholly owned) of Phillips Petroleum Company are:

Acurex Corporation
Arctic LNG Transportation Company
Bruin Carbon Dioxide Corporation
Calatrava, Empresa para la Industria Petroquimica, S.A.
Canyon Reef Carriers
Cochin Refineries Limited
East Texas Salt Water Disposal Company
Heat Transfer Research, Inc.
Kenai LNG Corporation
Long Beach Oil Development
Oil Insurance Limited
Papago Chemicals, Inc.
Phillips Carbon Black Limited
Phillips Gas Supply Corporation
Phillips Pacific Chemical Company
Plasticos Vanguardia, S.A.
Polar LNG Shipping Corporation

The Salk Institute Biotechnology/Industrial Associates, Inc.
White River Shale Oil Corporation
Aero Oil Company
Canada Western Cordage Company Limited
Chisholm Pipeline Company
Everglades Pipe Line Company
Explorer Pipeline Company
Kaw Pipe Line Company
Nordisk Kemi AB
Nordisk Philblack AB
Norland GmbH Fur Grundbesitz Und Industrieanlagen
Norpipe Petroleum UK Limited
Norsea Gas GambH
Quimica Venoco C.A.
Renalit—Fertighaus GmbH
Seadock, Inc.
Seaway Pipeline, Inc.
Solar Gas, Inc.
Spodco-USA, Inc.
Texas Offshore Port, Inc.
Venezoil, C.A.
Western Desert Operating Petroleum Company
Colonial Pipeline Company
Compagnie Francaise Du Carbon Black
Dixie Pipeline Company
Drisco, S.A. de C.V.
Industrias Negromex, S.A. de C.V.
Petrochim
Spodco Limited
Trenwick Limited
Great Yarmouth Port Labour Company Limited
Norsea Pipeline Limited
Phillips-Imperial Petroleum Limited (owned by Subsidiary of Phillips Petroleum Company United Kingdom Limited)
Philmac Oils Limited

Philmac Panama Incorporated
Sevalco (Holdings) Limited
Iranian Marine International Oil Company ("Iminoco")
Alyeska Pipeline Service Company
Insurance & Reinsurance Brokers (Bermuda) Limited
Norpipe a.s.
Norsea Gas A/S
Phillips Carbon Black Company (Proprietary) Limited
Phillips Carbon Black Italiana S.P.A.
Phillips Petroleum Singapore Chemicals (Private) Limited

PLACID OIL COMPANY

Placid Oil Company is a privately owned corporation. Placid has no subsidiaries or affiliates which are not wholly owned.

SHELL OIL COMPANY

Shell Oil Company is affiliated with Shell Energy Resources Inc., Pecten International Company, Shell California Production Inc., Shell Mining Company, Shell Offshore Inc., Shell Western E&P Inc., Pecten Limited and Pecten Trading Company. All of the stock of the companies other than Shell Oil Company is owned directly or indirectly by Shell Oil Company. All of Shell Oil Company's stock is owned of record or by beneficial title by Shell Petroleum N.V., a Netherlands company. The voting shares of Shell Petroleum N.V. are held 60 percent by Royal Dutch Petroleum Company and 40 percent by Shell Transport and Trading Company, a Public Limited Company in London, U.K. The following companies are affiliated with Shell Oil Company or one of the affiliates named above, but are not wholly owned subsidiaries:

Quazite Corporation
First Harlem Securities Corporation

Fractionation Research, Inc.
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
LOOP, Inc.
MESBIC Financial Corporation of Houston
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Pioneer Equipment Co.
Seadock, Inc.
Pecten Cameroon Company
Thums Long Beach Company
East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Van Salt Water Disposal Company
Wyoming Industrial Development Corporation
Cortex Capital Corporation
Plastibeton, Inc.
Butte Pipe Line Company
Dixie Pipeline Company
Explorer Pipeline Company
LOCAP, Inc.
Olympic Pipe Line Company
Plantation Pipe Line Company
West Shore Pipe Line Company
Wolverine Pipe Line Company

SUN EXPLORATION AND PRODUCTION COMPANY

Sun Exploration and Production Company is a wholly owned subsidiary of Sun Company, Inc.

The subsidiaries and affiliates (not wholly owned) of Sun Company, Inc. are:

Alaska Bulk Carriers, Inc.
Becton, Dickinson and Company
Canyon Reef Carriers Inc.

Hemisphere Oil Company, Inc.
Deepsea Ventures, Inc.
Mid Valley Pipeline Co.
Texoma Pipe Line Co.
Sun Olin Chemical Co.
International BioMedical Instruments, Inc.
The VLM Corporation
White River Shale Oil Corporation

TENNECO OIL COMPANY

Tenneco Oil Company is a wholly owned subsidiary of Tenneco Corporation, which is a wholly owned subsidiary of Tenneco Inc.

The affiliates and subsidiaries (not wholly owned) of Tenneco Inc. are:

Akulu Chemicals (PTY.) Limited
Akulu Marchon (PTY.) Limited
Albright & Wilson (Australia), Ltd.
Albright & Wilson Match Phosphorus Company, Ltd.
Arndale Fuels, Ltd.
Bracey Petroleum Products, Ltd.
Butler Oil Products Ltd.
Collins Pipeline Company
Depositas Del Norte, S.A.
HT Gathering Company
Intertractor Viehmann GmbH & Co.
J.I. Case do Brasil & Cia.
Kern Island Water Company
Kern Riber Canal and Irrigating Company
Losenhausen Maschinenbau Ag
Marchon-Paragon Holdings (PTY.) Ltd.
Marchon-Paragon Sulphonation (Cape) (PTY) Ltd.
Marchon-Paragon Sulphonation (PTY) Ltd.
Mistal Inc.
Monroe Auto Pecas S.A.
P.P.M. Guindastes Hidraulicos S.A.

S.A. Paper Chemicals Company (Proprietary) Limited
Societe Anonyme Industrille de Resines
Stoco Mutual Water and Sewer Company
Tees Storage Limited
Tenngasco Gas Gathering Company
TENN-USS Chemicals Finance Corporation
T & M Terminal Company
Tractortechnic Canada, Ltd.
Vibromax France S.A.R.L.

TEXACO INC.

The subsidiaries and affiliates (not wholly owned) of Texaco Inc. are:

Caltex Australia Limited
Deutsche Texaco Aktiengesellschaft, S.I.A.M.
Koa Oil Company
Korea Tanker Company Limited
Texaco Canada Inc.
Texaco Ghana Limited
Texaco Mexicana, S.A. de C.V.
Texaco Nigeria Limited
Texaco Togo
The Great Eastern Oil & Import Co. Limited

UNION OIL COMPANY OF CALIFORNIA

Union Oil Company of California is a wholly owned subsidiary of Unocal.

The subsidiaries and affiliates (not wholly owned) of Unocal are:

Keneb Services, Inc.
Magma Power Company

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No. 85-139

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

PENNZOIL COMPANY, *et al.*,
Petitioners,
v.
ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS THE PROCESS GAS CONSUMERS GROUP AND THE AMERICAN IRON AND STEEL INSTITUTE IN OPPOSITION

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QUESTIONS PRESENTED

Whether, if fairly characterized, any question arising from the decision below warrants review by this Court on certiorari:

1. Whether it was prejudicial error for the court of appeals to state that a motion to enforce compliance with a previous mandate can serve concurrently as a petition for review where the court, specifically holding that its mandate to the Federal Energy Regulatory Commission (FERC) had been circumvented, entered a judgment specifically granting the enforcement motion as such.

2. Whether, even assuming that the court of appeals did treat an enforcement motion concurrently as a petition for review under Section 506 of the Natural Gas Policy Act, 15 U.S.C. § 3416, the procedural requirements for such review were offended where (a) the agency order involved was already an order on rehearing of the very matter at issue and (b) that order demonstrated on its face the agency's disobedience of the court of appeals' previous mandate.

3. Whether a grant of an enforcement motion, limited to rejection of a collateral attack on the court's previous mandate requiring refunds, and causing no prejudice to petitioners' rights subsequently to pursue review of wholly distinct and severable issues, offended any considerations of judicial economy.

4. Whether the court of appeals, by vacating a FERC order found to be in violation of the court's previous mandate requiring refunds, deprived petitioners of any due process rights where (a) petitioners conceded that refunds were required; (b) petitioners were afforded full opportunity to address the merits and did so; (c) all other issues of interest to petitioners were fully preserved for subsequent review in the same court, and (d) the funds which petitioners sought to obtain via these proceedings have since been ordered to be paid to them in full by September 30, 1985?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-139

PENNZOIL COMPANY, *et al.*,
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v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS THE PROCESS GAS CONSUMERS GROUP AND THE AMERICAN IRON AND STEEL INSTITUTE IN OPPOSITION

Respondents the Process Gas Consumers Group and the American Iron and Steel Institute respectfully request that this Court deny the Petition for Writ of Certiorari sought herein to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in Nos. 81-1690, *et al.*[1]

---

[1] Respondent, the Process Gas Consumers Group ("PGC"), is an association of industrial consumers of natural gas. PGC is participating in this proceeding through an *ad hoc* committee, the members of which are: Armco Inc., Bethlehem Steel Corporation, Borg-Warner Corporation, Carpenter Technology Corporation, Cone Mills

STATEMENT OF THE CASE

Contrary to the broad characterization offered by petitioners ("Producers"), this case does not involve any sweeping changes in the relationships among federal agencies, reviewing courts, and the parties before them. (*See* Petition at 9.) Rather, this case involves only a series of ordinary (though admittedly protracted) regulatory and judicial proceedings, culminating in a court of appeals' decision to enforce its own mandate by vacating an agency order that clearly violated that mandate and reinstating an agency order that complied with it. Among the extraordinary facts leading up to that decision, the following are key:

Corporation, General Motors Corporation, LTV Steel Company, Owens-Corning Fiberglas Corporation, and Owens-Illinois, Inc.

Respondent, the American Iron and Steel Institute ("AISI"), is a trade association representing the steel industry. The corporate members of AISI are: The Algoma Steel Corporation, Limited, American Cast Iron Pipe Company, Armco Inc., Atlantic Steel Company, Atlas Steels, The Babcock & Wilcox Company, Bethlehem Steel Corporation, Carpenter Technology Corporation, CCX, Inc., The Cleveland-Cliffs Iron Company, Columbia Tool Steel Co., Compania Siderugica Huachipato, S.A., Copperweld Corporation, Dofasco, Inc., Electralloy Corporation, A. Finkl & Sons Co., Georgetown Industries, Inc., Green River Steel Corporation, Harsco Corporation, Hi Specialty America, HYSLA, S.A., Ingersoll Steel, Inland Steel Company, Interlake, Inc., International Metals Reclamation Co., Inc., IPSCO, Inc., Jessop Steel Company, Earle M. Jorgensen Company, Laclede Steel Company, Lone Star Steel Company, LTV Steel Company, Lukens, Inc., The M.A. Hanna Company, McLouth Steel Products Corporation, National Steel Corporation, New Jersey Steel Corporation, North Star Steel Company, Northwestern Steel and Wire Company, Oglebay Norton Company, Oregon Steel Mills, Pickands Mather & Co., Raritan River Steel Company, Rhode Island Forging Steel, Inc., Rome Strip Steel Company, Inc., Sandvik, Inc., Sharon Steel Corporation, Sharon Tube Company, Shenango Incorporated, SIDBEC-DOSCO, Inc., Stelco, Inc., Sydney Steel Corporation, Teledyne Vasco, The Timken Company, United States Steel Corporaiton, Valley Mould and Iron Company, Weirton Steel Corporation, Wheatland Tube Company, and Wheeling-Pittsburgh Steel Corporation.

(1) that a final D.C. Circuit decision ("*INGAA I*")[2] imposed upon Producers and others a large refund obligation *to* their customers; this obligation to make "Btu refunds" arose from overcharges collected during the period December 1978-December 1983 due to certain illegal pricing methods;

(2) that previously, as a result of a wholly unrelated FERC proceeding (as to which appellate review was then still pending),[3] Producers and others had become eligible to receive certain payments *from* their customers for eligible production costs; such payments were to be made to them in equal installments over a 22-month period from February 1983 through December 1984;

(3) that, although no stay was ever issued of FERC's order that those production cost payments be made, many pipelines unilaterally decided not to make the required payments to their suppliers during the 22-month period allowed; and

(4) that, in the FERC proceeding on remand from *INGAA I*, Producers saw a completely unrelated pool of dollars from which they hoped finally to obtain payment of the production debts allegedly owed them; thus, they urged FERC to allow them to offset their *INGAA I* obligations to their pipeline customers against those customers' unrelated production debts to them. Other parties vigorously opposed this attempt by producers and pipelines to settle their production cost disputes with refund monies belonging not to the pipelines, but to those consumers who had been overcharged in the past.

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[2] *Interstate Natural Gas Ass'n of America v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1615 (1984) ("*INGAA I*").

[3] FERC Order No. 94-A, 48 Fed. Reg. 5152 (1983), *aff'd in part, vacated in part, and dismissed in part, Texas Eastern Transmission Corp. v. FERC*, No. 83-4390 (5th Cir. Aug. 19, 1985).

In its Order No. 399,[4] the FERC correctly rejected the Producers' requests that it authorize offsets, instead ordering that the required *INGAA I* refunds be made generally via lump sum cash payments. In so doing, FERC noted that to allow offsets could undermine case-by-case production cost disputes, further complicate an already difficult process, frustrate pending Fifth Circuit review of production cost issues (*see* note 3 *supra*), and "prevent the Btu refunds from reaching as many of the customers actually overcharged as possible." (Petition App. at 27a-28a).

Subsequently, however, upon rehearing of the offset issue, a bare majority of the FERC Commissioners issued Order No. 399-A, 49 Fed. Reg. 46,353 (1984) (Petition App. at 81a-126a), which, as the D.C. Circuit correctly characterized it below, "abruptly reversed [FERC's] position on offsets . . . without addressing the weighty rationale behind its earlier Order [399]." *Interstate Natural Gas Ass'n of America v. FERC*, 756 F.2d 166, 169 (D.C. Cir. 1985 (*"INGAA II"*) (Petition App. at 9a). Although certain Producers immediately raced to file appeals in the Fifth Circuit with respect to Order 399-A's treatment of other non-offset-related issues,[5] four

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[4] 49 Fed. Reg. 37,735 (1984) (to be codified at 18 C.F.R. Part 154). *See also* Appendix B to Producer's certiorari petition, at 16a-80a. The appendices to Producers' petition are hereinafter cited as "Petition App. at —a" and "Petition Supp. App. at —b."

[5] *E.g., Mobil Oil Exploration & Producing Southeast Inc. v. FERC*, No. 84-4775 (5th Cir. filed Nov. 20, 1984) (*"MOEPSI v. FERC"*).

It bears noting that, when Order 399-A was issued, Producers urged "that no further rehearings should be permitted" by FERC, asserting their belief that the agency had already "afforded all parties a full opportunity to express their positions and arguments in support thereof. . . ." Conditional Request for Rehearing of Indicated Producers, filed Dec. 20, 1984, in FERC Docket Nos. RM84-6-003, *et al.*, at 3, *citing Shell Oil Co. v. FPC*, 520 F.2d 1061 (5th Cir. 1975), *cert. denied sub nom. California Co. v. FPC*, 426 U.S. 941 (1976).

of the Respondents herein (including PGC and AISI) concluded that ordinary judicial review would be inapposite to, and an inadequate remedy for, their concerns regarding FERC Order 399-A. Those concerns were not with the details of the agency order (*cf.* Producers' concern with the order's treatment of certain working interest owners' obligations), but rather went to the threshold question of the agency's compliance *vel non* with the *INGAA I* mandate. Such being the case, the Respondents sought not "judicial review" of Order 399-A but, instead, to bring to the attention of the *INGAA I* court the single fact that its mandate was being disobeyed on remand. Respondents thus requested the D.C. Circuit to invoke its inherent jurisdiction in aid of its prior mandate rather than stand by helplessly as Producers first persuaded FERC to reverse itself and circumvent that mandate and then raced to ask another court of appeals to interpret that mandate.

Producers submitted detailed written responses to each of the Respondent's enforcement motions in the court of appeals below, not only challenging Respondents' reliance on the enforcement motion procedure, but also addressing the merits of whether offsets in fact operated to frustrate the court's mandate.

Upon full consideration of the issue and the arguments thereon, the D.C. Circuit in *INGAA II* confirmed that an "inexorable" requirement of its *INGAA I* mandate had been to "remedy the effects of past use of the improper pricing method at the earliest possible moment." 756 F.2d at 168. (Petition App. at 7a). Accordingly, it rejected Producers' arguments[6] that the offset scheme

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[6] Response of Indicated Producers To Motion of Petitioner Associated Gas Distributors for Order Directing Compliance With Mandate, filed Dec. 3, 1984, in *Interstate Natural Gas Ass'n of America v. FERC*, Nos. 81-1690, *et al.* (D.C. Cir.) at 3, 5, 7-8, 10.

modified only the *method* of payment, but not the *amount*, of the required refunds, holding:

> [P]ermitting producers to offset their refund obligations would bring delay and confusion into an already complex area. Moreover, the *principles of law and the customers involved in the refund arrangement are far from identical to those implicated in the Section 110 [production] costs proceedings. . .* Involving disparate issues in a matter on appeal to another court can only complicate, delay, and *obfuscate the refunds at issue here.*
>
> The law requires the ordering of refunds at the earliest possible moment. That moment has come and gone.[7] The offset scheme embodied in Order No. 399-A will only further delay refund of the overcharges, *circumventing our mandate* in [*INGAA I*] and the clear instruction of the Supreme Court in [*FPC v.*] *Tennessee Gas* [*Transmission Co.*, 371 U.S. 145 (1962)].

INGAA II, *supra*, 756 F.2d at 171 (emphasis added) (Petition App. at 12a).[8]

While declaring that the "availability of mandamus to confine FERC to the terms of this court's mandate is fully supported by precedent", 756 F.2d at 169 (Petition App. at 9a), the court of appeals nevertheless reasoned that it did not need to address directly the propriety of mandamus in this specific case since direct review and

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[7] As of the March 1985 date of *INGAA II*, it had been more than a year and a half since the August 1983 *INGAA I* decision and well more than a year since the *INGAA I* mandate issued in December 1983.

[8] Circuit Judge Scalia concurred in the judgment on grounds that the offset scheme violated the statutory prohibition against retroactive ratemaking. (Petition App. at 15a). Although Judge Scalia subsequently replaced his concurring opinion with a dissent addressing only the propriety of the procedure followed (Petition App. at 133a-135a), he made no effort to recant his previous firm conclusion that such offsets are *prohibited as a matter of law.*

mandamus "may be sought in the alternative", 756 F.2d at 170 (Petition App. at 10a), and since the parties to the case had already "amply addressed the merits". *Id.* (Petition App. at 11a). However, notwithstanding its statement that Respondents' motions to enforce the mandate may be treated "as a petition for review", *id.*, the judgment issued by the court of appeals in the case specifically ordered "that the motion by Associated Gas Distributors to direct compliance with the Court's mandate herein is granted. . ." (Petition App. at 131a).

Producers' suggestion for rehearing *en banc* was circulated to the full D.C. Circuit and the same was denied with no participating member of the court requesting the taking of a vote thereon. (Petition App. at 136a).

On August 19, 1985, the Fifth Circuit issued its decision on appeal from FERC Order No. 94-A (*see* note 3 *supra*) confirming, wholly apart from any offset issue, the general validity of production cost debt obligations. Having thus disposed of the cases involving the debts against which the unrelated refund offsets had been proposed, the Fifth Circuit simultaneously ordered transferred to the D.C. Circuit both Btu refund cases, *i.e.*, *MOEPSI v. FERC*, *supra* (Producers' appeal of non-offset-related issues arising from FERC Order Nos. 399 and 399-A) and *Mobil Producing Texas & New Mexico Inc. v. FERC*, No. 85-4485 (5th Cir. filed July 24, 1985) (Producers' appeal of the FERC Order (No. 399-B, 50 Fed. Reg. 30,141 (1985), Petition Supp. App. at 1b-9b) implementing the D.C. Circuit's anti-offset mandate in *INGAA II*.)

REASONS FOR DENYING THE WRIT

I. The D.C. Circuit's Reasoning That An Enforcement Motion Could Be Treated Concurrently As A Petition For Review Was, If Error At All, Merely Harmless Error Since All Applicable Procedural Requirements Were Met And No Party's Due Process Rights Were Violated.

The judgment entered by the court of appeals below (Petition App. at 131a) specifically granted motions to enforce its previous mandate notwithstanding the statement in the court's opinion that it "need not enter the debate over the propriety of resort to mandamus in this case" and its discussion of the availability of direct review and mandamus in the alternative. 756 F.2d at 169-70. (Petition App. at 9a-11a.)[9] Under the unusual circumstances involved—in which the court of appeals specifically concluded that the FERC was not only circumventing the court's 15-month-old mandate but also defying the teaching of this Court concerning the prompt ordering of refunds to consumers[10]—the court's exercise of its inherent authority to construe and enforce its mandate was indeed justified. Producers' hyperbolic suggestion (Petition at 8-9) that the court's action below will open the floodgates to use of enforcement motions in lieu of petitions for review is but a bugbear, ignoring the strictly limited factual and legal context in which that action was taken. While Producers' vision of a world of procedural chaos may raise questions of academic interest, this case presents no basis to decide them. Nor is there, beyond mere *ipse dixit*, any credible suggestion that the unusual

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[9] Producers *incorrectly* represent in their Petition herein that the court of appeals "[saw] that mandamus did not properly lie." (Petition at 21.) No such decision was reached.

[10] *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 155 (1962), quoted below at 756 F.2d at 170-71. (Petition App. at 11a-12a).

context in which this case arose lends itself to repetition. The D.C. Circuit gave full consideration to the specific issue presented and decided it correctly in the particular circumstances presented; that court's exercise of its clear discretion to enforce its mandate without prejudicing direct review of other aspects of FERC Order 399-A does not warrant a grant of certiorari.

Moreover, even if, notwithstanding its judgment specifically granting enforcement motions, the D.C. Circuit intended to treat the motions before it in part as petitions for review, that intention does not rise above the level of harmless error.[11]

A. Producers err in insisting that, because no applications for rehearing were first filed and denied by FERC, the enforcement motions below could not have been treated concurrently as petitions for review. The rehearing requirement is intended only to give an agency an initial opportunity to correct its errors before an appeal is taken and to give the reviewing court the benefit of the agency's analysis. *Ecee, Inc. v. FERC*, 611 F.2d 554, 565 (5th Cir. 1980). But Order No. 399-A was *itself an order on rehearing of the offset issue*, and, as Producers themselves recognized at that time, all parties had by then had "full opportunity to express their positions and arguments in support thereof." *See* note 5 *supra*. The purposes of the statute having thus been satisfied, there was no need for further rehearing prior to judicial review. *See Public Serv. Comm'n v. FPC*, 543 F.2d 757, 774-75 n.116 (D.C. Cir. 1974) ("Surely a modification of a prior administrative decision o[n] rehearing does not generate a need to request another

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[11] *See Helvering v. Gowran*, 302 U.S. 238, 245 (1937): "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason." *See also* 28 U.S.C. § 2111.

rehearing where the litigant has already presented his point to the Commission for decision. . . .")[12]

B. Producers similarly err in asserting that the D.C. Circuit was required to have before it the entire FERC record on remand. Given the limited enforcement relief sought and granted, the court of appeals needed nothing more before it than its own *INGAA I* mandate and FERC's order purporting to implement it. Even so, although the court itself was certainly the best interpreter of the requirements of its own mandate, it did *also* have the benefit of all parties' views on the merits of the offset issue.[13] No further record was needed to permit the court of appeals to take the limited step of exercising its jurisdiction to enforce its mandate. Certiorari is not warranted to review the court of appeals' discretion concerning the adequacy of the evidentiary record before it to enforce its own mandate—and certiorari is certainly not warranted where Producers had full opportunity to cite to the court any portion of the record deemed relevant.

C. The court of appeals had clear jurisdiction to enter its judgment below,[14] and its doing so did not result in

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[12] Although, in the decision cited in the text, the petitioner itself had applied for rehearing of the agency's previous order, the court of appeals' reasoning was more broadly applicable:

> The obvious purpose of the statutory [rehearing] requirements is to afford the Commission the first opportunity to consider, and perhaps dissipate, issues which are headed for the courts. . . . We have consistently held that our authority to review actions of the Commission is unaffected by events—even irregularities—which do not hamper attainment of that objective.

Id. (citations omitted and emphasis added).

[13] In fact, Producers utilized the *two* opportunities afforded them to address those merits prior to the panel's decision.

[14] Since no record had yet been filed in any other court, no court yet enjoyed *exclusive* jurisdiction to review Order 399-A, *see* 15 U.S.C. § 3416(a)(4). Certainly no court could at that time claim

any "piecemeal review" offensive to considerations of judicial economy.[15] Respondents did not seek, and the D.C. Circuit below did not grant, comprehensive judicial review of Order 399-A. The D.C. Circuit was fully aware that Producers had already sought that type of review in the Fifth Circuit, *see* 756 F.2d at 169 (Petition App. at 9a), and the judgment it entered in *INGAA II* was carefully limited to a single threshold issue—doing nothing to prejudge the issues raised by Producers in their Fifth Circuit appeal.[16] Judicial review of Producers' issues may

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a valid right to deprive the D.C. Circuit of jurisdiction to enforce its own mandate—a fact implicitly recognized by the Fifth Circuit's decisions to defer the filing of the record until the completion of the D.C. Circuit's threshold consideration of FERC's compliance with its previous mandate. (*See* Petition App. at 137a, 138a). Such deference to pending proceedings in a sister court of appeals, which had already issued a mandate in an earlier phase of the same matter, was fully consistent with sound practice and the goal of maintaining decisional continuity. *See Public Serv. Comm'n v. FPC*, 472 F.2d 1270, 1272 (D.C. Cir. 1972).

[15] Cases cited by Producers on this point (Petition at 16) have no relevance to the instant proceeding. The court's concern in *Cities of Anaheim and Riverside v. FERC*, 692 F.2d 773, 779 (D.C. Cir. 1982), was that review of an order only initially accepting an application for filing would invade the administrative province, particularly where the petitioner would later have an opportunity to address the merits before the agency. Similarly, *Pennzoil Co. v. FERC*, 742 F.2d 242 (5th Cir. 1982), involved only an interlocutory order, review of which would have invaded the administrative province and offended judicial economy. In contrast, in the instant case, all parties have been fully heard and the Commission's order was a final one.

[16] According to pleadings filed by Producers originally in the Fifth Circuit, their appeals from FERC Order Nos. 399 and 399-A raised two issues concerning (1) whether, *apart* from any offset, FERC used the correct formula to calculate the amount of producers' individual refund obligations and (2) certain working interest owner refunds. *See* Producers' "Motion Under The All Writs Act For An Emergency Stay", etc., filed July 26, 1985, and "Reply of Producers In Support of Motion", etc., filed August 13, 1985, both in *MOEPSI v. FERC, supra*, at pp. 11-14 and 20-23, respectively.

proceed just the same as it would have had *INGAA II* not been issued since, as Producers emphasized to the court of appeals below, they have "never argued that they did not have to make refunds." [17]

Moreover, since Producers' requests for stays of their Btu refund obligations were denied by the FERC (on May 1, 1985), by the D.C. Circuit (on May 20, 1985), and by Chief Justice Burger as Circuit Justice for the District of Columbia Circuit (on June 3, 1985), their obligation to make refunds must be met by the *August 30, 1985 deadline* prescribed in FERC Order 399-B. (Petition Supp. App. at 7b). This too confirms the fact that Producers' appeals on non-offset issues will be heard in the very same posture as if *INGAA II* had never been issued: that is, the Btu refunds will have been paid [18] subject only to potential recalculation and partial repayment in the event of a D.C. Circuit order reversing FERC on other issues raised by Producers in the appeals originally filed in the Fifth Circuit.

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[17] "Petition of Indicated Producers for Rehearing and Suggestion for Rehearing *En Banc*," filed March 8, 1985, at 13. *See also* "Response of Indicated Producers To Motion of Petitioner Associated Gas Distributors For Order Directing Compliance With Mandate," filed Dec. 3, 1984, in *INGAA v. FERC*, Nos. 81-1690, *et al.* (D.C. Cir.) at 8, where Producers twice conceded that refunds were required by *INGAA I*. Nevertheless, in their certiorari petition to this Court, Producers felt free to contradict directly those prior statements. (Petition at 22).

[18] Producers have consistently argued that the Order 399-A offset procedure changed only the "method" of refund payment, not the amount of the refunds. *See, e.g.*, Petition at 4, 17. Under that theory, therefore, Producers cannot be heard now to complain that, but for *INGAA II*, they would not have been required to "pay" their refund obligations prior to completion of the pending proceedings transferred from the Fifth Circuit to the D.C. Circuit. (Order 399-A required all offsets to be completed before January 1, 1985. *See* Petition App. at 88a.)

Thus, Producers have suffered no prejudice due to the D.C. Circuit's decision in *INGAA II* merely to enforce its *INGAA I* mandate pending the Fifth Circuit's anticipated review of other issues.[19] No considerations of judicial economy have been offended. To the contrary, even prior to the Fifth Circuit's recent transfer to the D.C. Circuit of the appeals from FERC Order Nos. 399, 399-A and 399-B, the interests of judicial economy were *advanced* by the D.C. Circuit's decision in *INGAA II* to confirm the scope of its previous mandate as a *threshold* matter, *i.e.*, before the agency record was filed in the Fifth Circuit and before that court began an unnecessarily broad review of the issues presented to it. Those interests of judicial economy were indeed promoted by confining the anticipated Fifth Circuit proceedings to new issues arising on remand from *INGAA I* and relieving that court from having to review issues previously decided by a sister court of appeals. *A fortiori*, now that those review proceedings have been transferred to the D.C. Circuit, the judicial economy issue is even less apposite, if not moot.

II. The Court Of Appeals Did Not Intrude On FERC's Discretionary Authority.

Finally, Producers have presented to this Court the question of whether, even if the procedure followed *was* proper, the D.C. Circuit below impermissibly intruded upon FERC's discretion. (Petition at i, 21). While that claim may be of interest to the private parties to this case, the specific question presented is hardly one of

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[19] To the extent that Pitts Oil Company, not a party to the proceeding below, may raise in the now-transferred Fifth Circuit proceedings "the question of whether refunds should have been ordered by FERC at all" (Petition at 17), its efforts may be seen as a bald collateral attack on the D.C. Circuit's 1983 decision in *INGAA I*. Producers' careful distancing of themselves from that position (*id.*) suggests their recognition of that fact.

broader public interest or an appropriate one for this Court's review on certiorari.[20]

Moreover, contrary to Producers' view, the court of appeals below did *not* simply substitute its discretion for that of FERC. The offset procedure, pressed upon FERC by producers (and by pipelines eager to settle their debts to producers with money belonging to consumers), affected not merely *how* refunds would be made, but *whether* those refunds would ever be enjoyed by those pipeline customers who were originally overcharged under the rules invalidated in *INGAA I*. Making such refunds was not simply a matter of FERC discretion. Rather, it was a result *compelled as a matter of law* both (1) by the requirements of the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432, that gas prices charged by producers not exceed maximum prescribed levels, and (b) by this Court's requirement that refunds be implemented expeditiously. *FPC v. Tennessee Gas Transmission Co.*, *supra*. *INGAA II* did no more than enforce those requirements.

Thus, neither FERC's discretion nor its expertise were intruded upon below. Rather, after the agency's 15-month delay in implementing the *INGAA I* mandate, the D.C. Circuit had a legal responsibility to order—as an "inexorable" consequence of that mandate—that FERC "remedy the effects of past use of the improper pricing method at the earliest possible moment." *INGAA II*, *supra*, 756 F.2d at 168. (Petition App. at 7a). In-

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[20] Not a single member of the D.C. Circuit (including Judge Scalia) voted to grant rehearing of this issue *en banc*, indicating that no member of the court of appeals considered the proceeding to involve "a question of exceptional importance." Fed. R. App. P. 35(a). *A fortiori*, then, this is not a matter warranting certiorari; it is well settled that certiorari jurisdiction is not conferred "merely to give the defeated party in the circuit court of appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

deed, rather than substituting its judgment for FERC's, the court of appeals merely re-established the *status quo ante* by vacating Order 399-A, an order which violated the court's mandate, and reinstating Order 399, an order which complied with it. Persuaded by "the weighty rationale behind [FERC's] earlier Order [399]," and finding that the agency's abrupt change of course was without adequate explanation and thus potentially "arbitrary and capricious," the court simply left the agency's *own* well-reasoned earlier order in effect. 756 F.2d at 169, 170 (Petition App. at 9a, 11a).

III. The D.C. Circuit's Decision Below Was Both Correct And Fair.

The "offset" scheme was originally proposed by Producers and others as a convenient opportunity to obtain payment of claims wholly unrelated to their *INGAA I* refund obligations to their customers. Notwithstanding such offsets' violation of both the *INGAA I* mandate and the statutory prohibition against retroactive rate increases,[21] FERC reversed itself and permitted offsets because of (a) many pipelines having simply flouted the requirements in FERC Order 94-A that they pay off their production cost debts in equal installments between February 1983 and December 1984, and (b) producers' growing despair of ever being paid those debts. By overturning Order 399-A's authorization of offsets, the D.C. Circuit correctly prohibited FERC from allowing those unrelated production cost claims to "complicate, delay, and obfuscate" the payment of the required Btu refunds to those entitled to them.[22]

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[21] *See* Section 5 of the Natural Gas Act, 15 U.S.C. § 717d; *FPC v. Tennessee Gas Transmission Co., supra,* 371 U.S. at 152-53; *Public Serv. Co. of New Hampshire v. FERC,* 600 F.2d 944, 957-61 (D.C. Cir.), *cert. denied,* 444 U.S. 990 (1979); *Belco Petroleum Corp. v. FERC,* 589 F.2d 680, 687 (D.C. Cir. 1978).

[22] The parties ultimately entitled to the Btu refunds were the gas consumers who were overcharged as early as December 1978

Moreover, as a result of *INGAA II*, FERC not only issued an order (No. 399-B) requiring the payment of all Btu refund obligations by August 30, 1985, but was also motivated to issue an order (No. 94-F, 50 Fed. Reg. 31,347 (1985)) requiring all long-overdue production cost payments to producers to be made once and for all by September 30, 1985. Thus, in the absence of any stay, the payments that inspired the "offset" scheme in the first place will properly have been made within but a few weeks of the date of this brief.

At this point, then, it appears that the result desired by Producers with respect to attempted offsets will shortly be achieved and that the particular procedural road taken by the parties and the courts to get to that point, though perhaps interesting, will clearly be of nothing more than "academic or . . . episodic" interest.[23] Such matters, it is respectfully submitted, do not warrant the exercise of certiorari jurisdiction.

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and ending December 1983. (*See, e.g.*, Order 399, Petition App. at 40a). In contrast, the consumers responsible for paying the production costs allowed under FERC Order No. 94-A were those buying gas during February 1983-December 1984 (or even later).

Thus, although overlapping, the identity and financial interest of the two groups of consumers downstream of the pipelines were far from identical. By disapproving offsets, therefore, the court of appeals kept producers and pipelines from agreeing to reduce the refunds owed ultimately to the former group of consumers by the amount of production costs owed ultimately by the latter group of consumers.

[23] *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 85-139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY, *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE AMERICAN PAPER INSTITUTE, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals acted within its authority in vacating a FERC remedial order which failed to comply with the court of appeals' prior decision in the same matter?

PARTIES TO THE PROCEEDING BELOW

The petitioners joining in the petition for a writ of certiorari are: Amoco Production Company; ARCO Oil and Gas Company, Division of Atlantic Richfield Company; Champlin Petroleum Company; Chevron U.S.A. Inc.; Cities Service Oil and Gas Corporation; CONOCO Inc.; Exxon Corporation; Gulf Oil Corporation; Mobil Oil Corporation; Mobil Oil Exploration & Producing Southeast Inc.; Mobil Producing Texas & New Mexico Inc.; Pennzoil Company; Phillips Oil Company; Phillips Petroleum Company; Placid Oil Company; Shell Offshore Inc.; Shell Western E&P Inc.; Sun Exploration and Production Company; Tenneco Oil Company; Texaco Inc.; The Superior Oil Company; and Union Oil Company of California.

The respondents are: American Iron and Steel Institute; American Paper Institute, Inc.; Associated Gas Distributors; El Paso Natural Gas Company; Interstate Natural Gas Association of America; Laclede Gas Company; Lone Star Gas Company; Louisiana Land & Exploration Company; Michigan Wisconsin Pipeline Company (now ANR Pipeline Company); Mississippi River Transmission Corporation; Natural Gas Pipeline Company of America; Northern Natural Gas Company; Process Gas Consumers Group; Texas Gas Transmission Corporation; Transcontinental Gas Pipeline Corporation; United Gas Pipe Line Company; Valero Transmission Company; and the Federal Energy Regulatory Commission.

LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

A list of all members of the American Paper Institute, Inc. and the parent companies, subsidiaries and affiliates of these members engaged in the manufacture of pulp, paper and paperboard products is included in Appendix A hereto.

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BRIEF FOR THE AMERICAN PAPER INSTITUTE, INC. IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals granting the mandamus relief requested by Associated Gas Distributors ("AGD") and vacating the relevant portion of Federal Energy Regulatory Commission ("FERC" or "Commission") Order No. 399-A is not reported but has been reproduced at p. 131A of the Appendix to Producers' Petition for a Writ of Certiorari ("Petitioners' Appendix"). The accompanying opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 756 F.2d 166 (D.C. Cir. 1985) and has also been reproduced at pages 1a-15a of Petitioners' Appendix.

The prior decision of the D.C. Court of Appeals which invalidated a method of measuring Btu (energy) content that resulted in substantial overcharges, and upon which AGD based its mandamus motion, is reported at 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1615 (1983).

Related Order Nos. 399 and 399-A of the Federal Energy Regulatory Commission are reported at 49 Fed. Reg. 37735 (Sept. 26, 1984), and 49 Fed. Reg. 46353 (Nov. 26, 1984), respectively, and are reproduced at pages 16a-126a of Petitioners' Appendix.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1985. The court of appeals denied petitions for rehearing on May 6, 1985 and suggestions for rehearing *en banc* on May 15, 1985. The petition for certiorari was filed on July 25, 1985. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1) (1982) and 15 U.S.C. § 3416(a)(4) (1982).

STATUTES INVOLVED

The All Writs Act, 28 U.S.C. § 1651 (1982), grants to the federal courts the authority to issue writs of mandamus "in aid of their respective jurisdictions." Sections 506(a) and (b) of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3416(a) and (b), govern judicial review of FERC orders issued under the NGPA.

INTRODUCTION

At the outset, it is important to note that neither the substantive issues relating to the proper method for measuring the Btu content of natural gas, nor the requirement of refunds as a result of past use of an improper Btu measurement method, are presented to this Court by the current petition. The proper method of

calculating Btu content and the need for refunds have already been adjudicated by the D.C. Circuit and this Court has already denied a petition for certiorari on these issues.[1] Only the narrow issue of how those refunds are to be made, and more particularly, the D.C. Circuit's invalidation of a FERC mechanism that would have delayed or hindered the payment of those refunds is now presented.

In ordering the FERC to vacate a set-off mechanism for implementing the refunds necessitated by its previous decision, the court of appeals was acting within its authority and in accordance with settled legal principles. Petitioners have identified neither a conflict between federal circuits nor an important question of federal law warranting the attention of this Court. The American Paper Institute, Inc. ("API") and other natural gas consumers are entitled to receive their long-overdue refunds without further delay.[2]

STATEMENT OF THE CASE

In July of 1980, the FERC issued a regulation allowing the Btu (energy) content of natural gas to be determined on a "dry" (actual delivery) basis for purposes of determining the maximum lawful prices under §§ 102-109 of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3312-3319 (1982). Prior to the issuance of this regulation, the Commission, for years, had required that the energy content of natural gas be determined on the "wet" basis which presumed that a standard amount

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[1] Interstate Natural Gas Association of America v. FERC ("*INGAA I*"), 716 F.2d 1 (D.C. Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 1615 (1983).

[2] API is the national trade association of the nation's pulp, paper and paperboard manufacturers. API's members are major consumers of natural gas and are significantly affected by the refund policy resulting from use of the improper Btu measurement method.

of water vapor existed in a given volume of natural gas. The change to the dry method of Btu measurement resulted in a higher number of Btus being determined to be in a volume of gas than the number resulting from the wet method.

On review, the court of appeals ordered the FERC to vacate the regulation allowing the use of the dry method in calculating ceiling prices under the NGPA. *INGAA I*, 716 F.2d 1. The court explained:

> "In sum, we find the Commission's dry rule to be inconsistent with the NGPA's language, structure, and legislative history." 716 F.2d at 16.

On remand, the FERC, in Order No. 399, amended its regulations to reinstate the established wet method, thereby "implementing the decision in *Interstate Natural Gas Association of America* v. *Federal Energy Regulatory Commission*." Petitioners' Appendix at 16a. The Commission established procedures for refunding revenues that exceeded the maximum lawful prices. In the proceeding before the Commission leading to Order No. 399, Pennzoil Company and other natural gas producers ("Producers") had urged the Commission to adopt a mechanism whereby amounts that producers were entitled to collect from purchasers under Section 110 of the NGPA, 15 U.S.C. § 3320 (1982), for performing certain production-related services, could be offset against Btu refunds found to be due and owing. In refusing to allow such a set-off mechanism, the Commission stated:

> "permitting section 110 costs and Btu refunds would complicate an already difficult process and would make Commission monitoring of Btu refunds more difficult. In addition, the Commission is concerned that permitting pipelines and first sellers to offset section 110 costs and Btu refunds could prevent the Btu refunds from reaching as many of the customers actually overcharged as possible. Considering that the section 110 orders are also subject to judicial re-

> view, the Commission believes it is more appropriate to segregate the collection of section 110 costs from the Btu refunds. For these reasons, the Commission is prohibiting the offset of section 110 costs and Btu refunds." Petitioners' Appendix at 27a-28a.

Rehearing of this order was sought before the FERC by the Producers who had urged the offset. In Order No. 399-A, the FERC, without providing any refutation of its previous position, reversed its position and required that Btu refunds owed be offset against Section 110 production-related amounts.[3]

Following the issuance of Order No. 399-A, AGD filed in the D.C. Circuit a motion seeking enforcement of that court's mandate in *INGAA I*. API, an intervenor, supported AGD's position that FERC's Section 110 offset procedure was inconsistent with *INGAA I*. On March 5, 1985, the court issued an order that granted AGD's motion and directed FERC to vacate the offset portion of Order No. 399-A. The court also issued a written opinion.[4]

The court of appeals found that one of the "inexorable" consequences of its prior decision was the need to "remedy the effects of past use of the improper pricing method at the earliest possible moment." 756 F.2d at 168. The court added, "more fundamentally, Order No. 399-A defies the teaching of the Supreme Court in *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 83 S.Ct. 211, 9 L.Ed.2d 199 (1962), [in which] the Court held that refunds must be implemented expeditiously." *Id.* at 170-71. Finding that Order 399-A was inconsistent with a basic premise

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[3] The rules establishing the Section 110 cost allowances have recently been affirmed in large part by the Fifth Circuit in *Texas Eastern Transmission Corp.* v. *FERC*, No. 83-4390, slip. op. (5th Cir. August 19, 1985).

[4] *Interstate Natural Gas Association of America* v. *FERC*, 756 F.2d 166 (D.C. Cir. 1985) (*"INGAA II"*).

of the court's prior decision, the court of appeals held that Order 399-A had to be abrogated:

> "the offset scheme embodied in Order No. 399-A will only further delay refund of the overcharges, *circumventing our mandate* in *Interstate* and the clear instruction of the Supreme Court in *Tennessee Gas.* We accordingly grant the relief sought by petitioners Associated Gas Distributors. We hereby direct FERC to vacate the [relevant] portion of Order No. 399-A . . ." 756 F.2d at 171 (emphasis added).

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUES RAISED ARE INSUBSTANTIAL.

This case does not present any issues of federal law important enough to warrant this Court's review. This court has already declined to grant certiorari on the merits of the Btu measurement decision. This case merely involves the implementation of that prior decision, the correctness of which is not now brought into question.

In the decision which is the subject of the pending petition, the D.C. Circuit simply directed the FERC to vacate that portion of its order that violated the court's prior decision on the merits. The effect of the Court's decision is to require gas producers to refund overcharges as expeditiously as possible. The refunds are due for natural gas sold as early as December of 1978, the effective date of the FERC's rules implementing the NGPA. Refunds owed to API member companies alone exceed $30 million, and the FERC has estimated that approximately $450 million in Btu refunds were withheld by gas producers to account for Section 110 offsets.

Further, there is no reason to believe that Producers could not recover revenues related to Section 110 costs from purchasing pipelines and other gas users without

the use of an offset. Producers and their pipeline purchasers can recover amounts that the Fifth Circuit has recently determined they are entitled to collect [5] in the manner that gas producers and pipelines have historically used to recover costs: by sending a bill to their customers every month.

In sum, Producers have failed to advance any issue of substantial significance that should lead this Court to grant their petition.

II. THE COURT OF APPEALS CORRECTLY VACATED THE OFFSET PROVISION OF THE FERC'S REFUND SCHEME.

Producers have not argued that the substantive decision of the court of appeals is impermissible; rather, they challenge the procedural route that led to that decision. Producers do not and cannot assert that the judicial review sections which they cite foreclose federal courts from issuing mandates to federal agencies.

A. The Court of Appeals Possessed Full Authority To Issue A Writ of Mandamus.

The All Writs Act provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651 (1982).

In *INGAA II*, AGD simply requested the court of appeals to ensure that its *INGAA I* mandate was not violated. Mandamus was "necessary [and] appropriate in aid of [the D.C. Circuit's] jurisdiction."

As described above, the court of appeals in *INGAA I* invalidated the FERC's adoption of the dry method of

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[5] *Texas Eastern Transmission Corp.* v. *FERC*, No. 83-4390, slip op. (5th Cir. August 19, 1985).

calculating Btus because that method was "inconsistent with the NGPA's language, structure, and legislative history." 716 F.2d at 16.[6] This Court declined to grant review of that issue. An inescapable corollary to the invalidation of that method was the need to refund overcharges resulting from the prior use of an unlawful measuring method, *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965), since retention of payments exceeding the NGPA maximum lawful prices is illegal. The court in *INGAA II* merely assured that those refunds owed would be made promptly to those who had been wrongfully overcharged. The *INGAA II* court was therefore correct to enforce its prior mandate.

Producers assert that a writ of mandamus cannot be used to compel adoption of a particular remedy when the agency possesses discretion to determine what remedy, if any, is appropriate (p. 21-22). *INGAA I* did not leave the FERC with boundless discretion. There is no question but that moneys unlawfully collected must be returned. The absence of specific language in *INGAA I* cannot reasonably be construed to indicate that the D.C. Circuit intended to grant to the FERC the discretion to determine when, if ever, the refunds would be paid. As the court made clear in its decision in *INGAA II*, "the law requires the ordering of refunds at the earliest possible moment. That moment has come and gone." 756 F.2d at 171.

B. The Statutory Provisions for Judicial Review of Agency Orders Do Not Render Mandamus Unavailable.

As the court of appeals correctly observed, under the circumstances presented a petition for review and a writ of mandamus were functionally equivalent. While it can

[6] Petitioners do not dispute the finality of that decision. See Petition at 3.

be argued that there is some ambiguity as to whether the court, in granting AGD's motion, was labeling its action a review of Order No. 399-A on the merits or an action under the All Writs Act, or both, the remedy granted and the legal analysis by which the court decided to award that remedy were completely appropriate to the case before it. In the absence of any substantive error, this Court should not now permit further delay by those striving to postpone the refunding of substantial overcharges dating back to 1978 that they were definitively determined to owe in 1983. Moreover, any dispute as to the proper circuit court for review is now moot because the Fifth Circuit has transferred the Producers' petition for judicial review of FERC Order No. 399-A to the D.C. Circuit.[7]

C. The Court of Appeals' Decision Will Not Foster Piecemeal Litigation or Adversely Affect the Established System of Judicial Review.

The facts of this case do not support Producers' claim that the *INGAA II* decision frustrates the Congressional policy favoring a single consolidated judicial review of agency orders. The splintering of issues arose out of the series of multifaceted and contradictory FERC orders and regulations. In any event, with the transfer of Producers' petition for judicial review to the D.C. Circuit, all Btu-related orders have been and are now before a single United States court of appeals.

This case presents a unique procedural history unlikely to be duplicated in the future. The parade of horribles envisioned by the gas producers, who depict disruption of the relationship between federal courts and agencies, is completely unfounded. In this case, the Btu regulation had been reviewed by the D.C. court after parties to that proceeding followed the appropriate judicial review proceedings. The All Writs Act was only available

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[7] The transfer order is included as Appendix B hereto.

because a final decision had already been issued by that court on the substance of the controversy. In this unique setting, the interests of judicial and administrative economy as well as fairness to affected parties dictated that mandamus be available to rectify swiftly the situation. This is especially true where speed in remedying the unlawfulness is of primary importance.

D. Petitioners Were Not Denied Due Process.

Producers have participated in all of the agency and court proceedings. They contend that "consideration of mandamus papers is not adequate to dispose of a case on the merits." (p. 20). But a decision on the merits of the Btu measurement issue had already been rendered by the D.C. Circuit. As that court recognized, the need to remedy immediately the effect of improper pricing was an inexorable result of its decision in *INGAA I*. The simple issue presented to the court of appeals in *INGAA II* was whether the FERC had adequately implemented the *INGAA I* directive.

The D.C. Court was familiar with the record in the case.[8] No new evidence was needed. The Court focused exclusively on the issue relevant to the request that its mandate be enforced. Thus, the court had no need to require the filing of the agency record and did not review the agency decision for arbitrariness or caprice. Instead, an examination of *INGAA II* reveals that the court did indeed review the agency order, but did so in response to a request for relief under the All Writs Act. The court did note the FERC's failure to provide a full and complete explanation for its about-face on the offset issue and stated that "without such an explanation, the agency's decision *may be* arbitrary and capricious," 756 F.2d at 170 (*emphasis added*), but did not decide that issue. The

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[8] The *INGAA II* panel was identical to the panel that decided *INGAA I*.

agency record in Order No. 399-A was thus unnecessary and irrelevant to the court's decisionmaking process. The Section 110 offset portion of Order No. 399-A could not stand because it was inconsistent with *INGAA I*, regardless of whether the FERC arrived at its decision in a non-arbitrary manner.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

Alabama River Pulp Company, Inc.

Subsidiary of Parsons & Whittemore, Inc.

Alpha Cellulose Corporation
American Convenience Products, Inc.
American Personal Products Company
American Tissue Corporation
Appleton Papers, Inc.

Subsidiary of B.A.T. Industries

Atlas Paper Mills, Inc.
Augusta Newsprint Company
Banner Fibreboard Company
Bear Island Paper Company
Blandin Paper Company
Boise Cascade Corporation

Affiliate: Boise Southern Company

Bowater, Incorporated
J.D. Cahill Company, Inc.
Caraustar Industries, Inc.

Subsidiaries:

Austell Box Board Corporation
Carolina Paper Board Corporation
Carotell Paper Board Corporation
Sweetwater Paper Board Company

Champion International Corporation
Chesapeake Corporation

Divisions:

Plainwell Paper Company
Wisconsin Tissue Mills, Inc.

Chicopee
Cleaners Hanger Company
Climax Manufacturing Company
Columbia Corporation, The
Consolidated Packaging Corporation

Consolidated Papers, Inc.
Container Corporation of America
Continental Paper Company, Inc.
Converting, Inc.
Cottrell Paper Company, Inc.
CPM, Inc.
Crane & Company, Inc.

Subsidiary: Byron Weston Company

Crown Zellerbach Corporation
Crystal Tissue Company, The
Dafoe & Dafoe, Inc.
Deerfield Specialty Papers, Inc.
Dennison Manufacturing Company

Subsidiary: Dunn Paper Company

Dexter Corporation, The
Domtar Specialty Packaging
Duni Corporation
Eastern Fine Paper, Inc.

Division of E.B. Eddy Forest Products, Ltd.

Ecusta Paper & Film Group Olin Corporation
Equitable Bag Company, Inc.
Erving Paper Mills

Subsidiaries:

Baldwinville Products, Inc.
Erving Paper Mills
Flamingo Products Company
Fox Paper Company
Hinsdale Products Company, Inc.
Sorg Products Company, Inc.

Esleek Manufacturing Company, Inc.
Exton Paper Manufacturers, Inc.
Federal Paper Board Company, Inc.
Fibre Leather Manufacturing Corporation
Filtration Sciences, Inc.
Finch, Pruyn & Company, Inc.

Fletcher Paper Company
Fortifiber Corporation
Foster Paper Company
Fox Valley Corporation

Divisions:
Artfaire
Fox River Paper Company

Fraser Paper, Limited
Freeman Paper Company
French Paper Company
FSC Paper Corporation
Garden State Paper Company, Inc.

Affiliate of Media General, Inc.

Georgia-Pacific Corporation
Gilman Paper Company
P.H. Glatfelter Company

Division: Bergstrom Paper Division

W.R. Grace & Company
Great Northern Nekoosa Corporation

Divisions:
Great Northern Paper Company
Great Southern Paper Company

Subsidiary: Nekoosa Papers Inc.

Green Bay Packaging, Inc.

Subsidiary: Arkansas Kraft Corporation

Grief Board Corporation
Gulf States Paper Corporation
Halifax Paper Board Company, Inc.
Halltown Paperboard Company
Hammermill Paper Company

Divisions:
Beckett Paper Company
Hammermill Papers Group
Manning Paper Company

Nicolet Paper Company
Strathmore Paper Company
Thilmany Puly & Paper Company

Affiliate: Grays Harbor Paper Company

Hampden Papers, Inc.
Hazen Paper Company
Heller & Usdan, Inc.
Hercules Incorporated
Hoffmaster Company, Inc.
Hollingsworth & Vose Company
Holliston Mills Inc., The
Holyoke Card & Paper Company
Inland Empire Paper Company
International Paper Company
Interstate Resources, Inc.
ITT Rayonier, Inc.

Affiliate: Grays Harbor Paper Company

Jackson Paper Manufacturing Company
James River Corporation

Divisions:

Curtis Paper Company
Newark Mill
H.P. Smith Division
Dixie/Northern Sector
Berlin-Gorham Group
KVP Group

Subsidiary: Riegel Products Corporation

Jefferson Smurfit Corporation
Jen-Coat, Incorporated
Keyes Fibre Company
Kieffer Paper Mills, Inc.
Laurel Hill Paper Company
Linweave Fine Papers, Inc.
Little Rapids Corporation

Divisions:

Potsdam Paper Company
Shawano Paper Mills

Longview Fibre Company
Louisiana-Pacific Corporation
Ludlow Corporation
Lydall, Inc.

Divisions:

Composite Materials Division
Technical Papers Division

MacMillan Bloedel, Inc.
McIntyre Paper Company, Inc.
Madison Paper Industries
Manchester Board & Paper Company
Manistique Papers, Inc.
Manville Forest Products Corporation
Marcal Paper Mills, Inc.
Mead Corporation

Affiliates:

Brunswick Pulp & Paper Company
Georgia Kraft Company

Subsidiary: Gilbert Paper Company

Menasha Corporation
Menominee Paper Company, Inc.

Subsidiary of Bell Fibre Products Corporation

Merrimac Paper Company, Inc.
Midtec Paper Corporation
Mohawk Paper Mills, Inc.
Monadnock Paper Mills, Inc.
Mosinee Paper Corporation

Divisions:

Bay West Paper Company
The Sorg Paper Company

National Gypsum Company
Newark Group, The

Subsidiaries:

California Paperboard Corporation
Connecticut Paperboard Corporation

Divisions:

Haverhill Paperboard Corporation
Middletown Paperboard Corporation
Natick Paperboard Corporation
Wisconsin Paperboard Corporation

Newman & Company, Inc.
Newton Falls Paper Mill, Inc.
Onduline U.S.A., Inc.

Subsidiary of Garden State Paper Company, Inc.

Orchids Paper Products-Concel Inc.

Subsidiary of APL Corporation
Subsidiary: Ponderosa Paper Products, Inc.

Owens-Illinois, Inc.
Packaging Corporation of America

Division of Tenneco, Inc.
Subsidiary: Tennessee River Pulp & Paper Company

Paper Art Company, Inc.
Paper-Pak Products, Inc.
Parsons Paper Division, The NVF Company
Pejepscot Paper

Division, The Hearst Corporation

Penntech Papers, Inc.
Pentair, Inc.

Subsidiaries:

Flambeau Paper Corporation
Miami Paper Corporation
Niagara of Wisconsin Paper Corporation
Port Huron Paper Corporation

Pope & T bot, Inc.
Portals, Inc.
Port Townsend Paper Corporation
Potlach Corporation
Procter & Gamble Company, The

Subsidiary: Buckeye Cellulose Corporation

Professional Medical Products, Inc.
Putney Paper Company, Inc.
Quaker Oats Company, The
C.A. Reed, Inc.
Riegel Textile Corporation
Rising Paper Company
Rock-Tenn Company
St. Joe Paper Company
Scott Paper Company

Division: S.D. Warren Company
Affiliate: Brunswick Pulp & Paper Company

Seaman Paper Company of Massachusetts, Inc.
Simplex Products Group
Simplex Industries, Inc.
Simpson Paper Company
Sonoco Products Company
Southeast Paper Manufacturing Company
Southwest Forest Industries, Inc.
Southworth Company
Springprint Paper Products Company
Stirling Manufacturing Company, Inc.
Stone Container Corporation

Subsidiary: South Carolina Industries, Inc.

Sullivan Paper Company
Tagsons Papers, Inc.
Technographics, Inc.

Division: Valentine Pulp and Paper Company

Temple-Inland, Inc.

Affiliate: Georgia Kraft Company
Subsidiaries:
Inland Container Corporation
Temple-Eastex, Inc.

Union Camp Corporation
Virginia Fibre Corporation
EHV Weidmann Industries, Inc.

West Carrollton Parchment Company
Weston Paper and Manufacturing Company
Westvaco Corporation
Weyerhaeuser Company

Subsidiary: North Pacific Paper Corporation

Whitestone Products
Willamette Industries, Inc.
Yorktowne Paper Mills, Inc.

Subsidiary: Yorktowne Paper Mills of Maine, Inc.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4775

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC., ET AL.
Petitioner

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 85-4485

MOBIL PRODUCING TEXAS & NEW MEXICO, INC., ET AL.,
Petitioner

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review of an Order of the
Federal Energy Regulatory Commission

(August 19, 1985)

Before CLARK, Chief Judge, BROWN, and JOHNSON, Circuit Judges.

BY THE COURT:

It is ORDERED that in the interest of justice the proceedings in No. 84-4775, styled Mobil Oil Exploration & Producing Southeast Inc., *et al.* v. Federal Energy Regulatory Commission, and in No. 85-4485, styled Mobil Producing Texas & New Mexico Inc., *et al.* v. Federal Energy Regulatory Commission, are hereby transferred to the United States Court of Appeals for the District of Columbia Circuit. 28 U.S.C. § 2112(a).

Supreme Court, U.S.
D
AUG 26 1985
JOSEPH F. SPANIOL, JR.

No. 85-139

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL OIL COMPANY, *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS ASSOCIATED GAS DISTRIBUTORS

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QUESTIONS PRESENTED

1. Whether a federal court of appeals may enforce its mandate by directing the agency below to vacate a portion of a final order issued for the purpose of complying with the mandate but which failed to do so.

2. Whether a federal court of appeals may treat a motion to enforce its mandate as a petition for review of final agency action.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-139

PENNZOIL OIL COMPANY, *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS ASSOCIATED GAS DISTRIBUTORS

Associated Gas Distributors (AGD)[1] hereby responds in opposition to the petition of Pennzoil Company, *et al.*

[1] AGD was a petitioner and intervenor in the proceedings below. It is an informal association of some 40 local gas distribution utilities that sell and distribute approximately 25% of the natural gas sold in the interstate market. Its members purchase most of their supplies of natural gas from interstate pipeline companies which, in turn, purchase most of their supplies from producers. The prices paid by interstate pipelines for gas supplies are flowed through to the pipelines' distributor-customers under FERC-approved purchased gas adjustment (PGA) procedures. Pursuant to Sup. Ct. R. 28.1, a list of AGD member companies and their affiliates is attached as Appendix D hereto.

(Petitioners) for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT OF THE CASE

In *Interstate Natural Gas Association v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1615 (1984) (*"INGAA I"*), the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") held that Federal Energy Regulatory Commission ("FERC" or "Commission") Order Nos. 93 and 93-A, which contained rules for measuring the energy (Btu) content of natural gas, resulted in prices that violated the maximum lawful prices set forth in the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1982). There were, in the D.C. Circuit's words, "inexorable" consequences of its decision in INGAA I: a proper pricing method had to be established for the future and a remedy for the overcharges that had resulted from the use of the improper pricing method had to be established. *Interstate Natural Gas Association of America v. FERC*, 756 F.2d 166 (D.C. Cir. 1985) (*"INGAA II"*) (Petitioners' Appendix at 7a).

The mandate in INGAA I issued on December 8, 1983. On January 19, 1984, FERC issued a Notice of Inquiry ("NOI") inviting comments on the issue of Btu refund procedures. The NOI contemplated a complicated four-phase proceeding, and on February 7, 1984, AGD objected to FERC that this would unnecessarily delay the refunds. On March 29, 1984, having heard nothing from FERC, AGD filed a motion in the D.C. Circuit asking for an order directing FERC to comply with the mandate in *INGAA I*. On April 25, 1984, the D.C. Circuit denied AGD's motion to enforce mandate, stating:

> Petitioner has not established that the agency is in breach of its obligation to direct the payment of refunds as soon as proper and expedited agency proc-

> ess allows. *See generally Federal Power Commission v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962); *Public Service Commission of the State of New York v. Federal Power Commission*, 543 F.2d 757 (D.C. Cir. 1974).
>
> Our denial is without prejudice to Petitioner's filing a subsequent motion if clear indication of agency compliance with our mandate, such as publication of a time schedule for a refund procedure, is not forthcoming at an early date.

Unpublished Order, D.C. Circuit No. 81-1690, issued April 25, 1984, attached hereto as Appendix A.

During the Spring of 1984, the Commission accepted comments on the NOI. Several parties raised the issue of offsetting the Btu refunds against amounts claimed by the producers for production-related costs pursuant to NGPA Section 110 and implementing rules issued by the Commission in Order Nos. 94-A *et seq.*[2] On May 3, 1984, the Commission issued an interim rule that did not provide for such offsets. In the ensuing comment period, AGD supported the interim rule and specifically addressed the issue of offsets, pointing out in some detail why they were inappropriate.[3] The Commission, explicitly acting in compliance with the court's mandate, issued the final rule, Order No. 399, on September 20, 1984, requiring the producers to refund the Btu overcharges and forbidding the offset of Btu refunds against the totally unrelated NGPA Section 110 production-related costs.

Upon requests for rehearing, the Commission issued Order No. 399-A on November 20, 1984 (Petitioners'

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[2] The Order No. 94 series of production-related cost orders were then on review in the Fifth Circuit in *Texas Eastern Transmission Corp. v. FERC* (Docket No. 83-4390) (decided August 19, 1985).

[3] See Respondents' Appendix B for a copy of AGD's comments on the offset issue.

Appendix A at 81). In this order "granting in part and denying in part rehearing" of Order No. 399, the Commission adopted a substantial and dramatic modification of the Final Rule set forth in Order No. 399 by permitting the offsets specifically prohibited therein. In so doing, the three Commissioners who supported Order No. 399-A did so "without addressing the weighty rationale behind its [FERC's] earlier Order." *INGAA II*, Petitioners' Appendix at 9a.

On November 21, 1984, AGD filed its second "Motion For Order Directing Compliance with Mandate" ("AGD Motion" or "Motion") in the D.C. Circuit.[4] In its Motion, AGD asked the court to order FERC to comply with its mandate in INGAA I by vacating the offset portion of Order No. 399-A and reinstating that part of Order No. 399 that prohibited offsets.

Meanwhile, on November 20, 1984, one of the producers filed a petition for review of Order Nos. 399 and 399-A in the United States Court of Appeals for the Fifth Circuit.[5] FERC petitioned the Fifth Circuit for permission to defer the filing of the record until the D.C. Circuit had acted on AGD's motion to enforce the *INGAA I* mandate. The Fifth Circuit agreed, deferring the filing until thirty days after the D.C. Circuit ruled on AGD's Motion.

The producers filed an opposition to the AGD Motion in the D.C. Circuit, arguing the merits of the offset issue as well as procedural issues. On March 5, 1985, the court granted AGD's Motion and ordered FERC to vacate the offset portion of Order No. 399-A for the reasons set forth in Order No. 399.

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[4] A copy of this Motion is contained in Respondents' Appendix C attached hereto.

[5] *Mobil Oil Exploration and Producing Southeast, Inc. v. FERC*, No. 84-4775 (5th Cir.). This appeal was transferred to the D.C. Circuit on August 19, 1985.

Various producers filed petitions for rehearing and suggestions for rehearing *en banc* which were denied on May 6, 1985 and May 15, 1985, respectively. The D.C. Circuit, on May 20, 1985, denied the producers' petition for a stay pending the filing with this Court of a petition for a writ of certiorari. The producers then filed an "Application for a Stay of Enforcement of the Judgment of the United States Court of Appeals for the District of Columbia Circuit" with the Chief Justice in his capacity as Circuit Justice for the District of Columbia Circuit. AGD opposed that motion and, on June 3, 1985, the Chief Justice denied the stay. Subsequently, on July 18, 1985, the Commission issued Order No. 399-B[6] in which it vacated the offset portion of Order No. 399-A and reinstated the offset prohibition contained in Order No. 399.

SUMMARY OF REASONS FOR DENYING THE PETITION

The D.C. Circuit's decision in *INGAA I* that Order Nos. 93 and 93-A had permitted producers to charge rates for natural gas that exceeded the maximum lawful prices under the NGPA and its order to FERC to correct that situation are final and binding on all parties. By law, the court's mandate necessarily required the Commission to order refunds and to set in motion procedures for their payment at the earliest possible moment consistent with due process. Because the offset provisions of Order No. 399-A did not comply with the court's mandate in *INGAA I*, AGD moved the court to order the Commission to vacate those provisions and to reinstate the offset prohibition contained in Order No. 399. The court did just that.

A court always has jurisdiction to interpret and enforce its own mandate. The question of what the D.C.

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[6] Various producers filed a petition for stay and for review of Order No. 399-B in the Fifth Circuit. On August 19, 1985, the Fifth Circuit transferred these matters to the D.C. Circuit.

Circuit's mandate included and whether it had been complied with was uniquely the province of that court. The Fifth Circuit, as the only other court in which petitions for review of Order Nos. 399 and 399-A were pending, recognized this by ordering FERC not to file the record there until after the D.C. Circuit decided AGD's motion to enforce the mandate. The court's decision in *INGAA II*, therefore, did not violate principles of comity. Nor did the court's action violate the policy of avoiding piecemeal review (a principle of judicial economy) because agency action was complete and the issues raised in the D.C. and the Fifth Circuits were separate and distinct. Finally, because the Commission does not have untrammeled discretion to decide the manner and timing of refunds and because the D.C. Circuit's action here only served to vacate that portion of the order which offended its mandate, the court did not usurp any discretionary agency function. For all these reasons, the court's actions to enforce its mandate did not constitute a departure from the accepted and usual course of judicial proceedings.

In its *INGAA II* opinion, the D.C. Circuit treated AGD's motion as a petition for review under Section 506 of the NGPA. The question before the court was whether the offset permitted by Order No. 399-A complied with its mandate in *INGAA I*. The Commission had already specifically considered the question of the offset twice before, and the court had before it the results of those deliberations in Order Nos. 399 and 399-A. In addition, the court had been fully briefed on the offset issue, and the analysis it engaged in was exactly the same as if it had treated AGD's motion to enforce mandate only as such. The court specifically found that no party was prejudiced by this procedure, and no due process rights were violated thereby. Accordingly, the D.C. Circuit's action did not constitute a departure from the accepted course of judicial proceedings.

For all these reasons, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS HAD JURISDICTION TO INTERPRET AND ENFORCE ITS MANDATE BY ORDERING THE COMMISSION TO VACATE PROVISIONS OF ORDERS THAT WERE IN CONFLICT WITH IT AND TO REINSTATE PROVISIONS OF ORDERS THAT WERE IN COMPLIANCE

A. The Mandate In *INGAA I* By Law Required The Commission To Make Refunds At The Earliest Possible Moment Consistent With Due Process

In *INGAA I*, the D.C. Circuit found that the Commission's new procedures for measuring the Btu content of natural gas permitted producers to charge more than the maximum lawful prices for that gas established by Title I of the NGPA, 15 U.S.C. §§ 3311-3319 (1982). If no refund were ordered, the Commission would, in effect, be condoning a ceiling price higher than the maximum lawful price in violation of Section 504 of the NGPA, 15 U.S.C. § 3414 (1982) and the Commission's regulations.[7]

At the time the D.C. Circuit issued its mandate in *INGAA I*, the principle had been well established by this Court that when refunds are required, they must

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[7] Section 270.101(e) of the FERC's regulations implementing the NGPA provides that:

> Any price collected with respect to a first sale of natural gas . . . is collected subject to a general obligation promptly to refund any portion of such price, together with interest . . . which is in excess of the maximum lawful price.

18 C.F.R. § 270.101(e) (1985). There are only a few limited circumstances, not applicable here, in which the maximum lawful price may be exceeded. An explanation of those circumstances is contained in footnote 11 to Order No. 399. *See* Petitioners' Appendix at 22a.

be made "at the earliest possible moment consistent with due process." *FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 155 (1962); *see also United Gas Improvement Company v. Callery Properties*, 382 U.S. 223, 230, *reh'g denied*, 382 U.S. 1001 (1965). Any other result would violate the purpose of both the Natural Gas Act (NGA),[8] and the NGPA which is

> [T]o afford the consumer a complete, permanent and effective bond of protection from excessive rates and charges.

Atlantic Refining Company v. Public Service Commission of New York, 360 U.S. 378, 388 (1959).[9] As this court pointed out in *FPC v. Tennessee Gas Transmission Company*, *supra*, 371 U.S. at 154-155, the mere promise of refunds in the future does not satisfy this requirement because

> [E]xperience has shown this to be somewhat illusory in view of the trickling down process necessary to be followed, the incidental cost of which is often borne by the consumer, and in view of the transient nature of our society which often prevents refunds from reaching those to whom they are due . . .

The longer the delay in making the refunds, the greater the chance that the consumers who will ultimately benefit from them will not be the ones who paid the overcharges. Thus, for these three reasons—(1) the Commission had no authority to permit producers to retain amounts exceeding the NGPA ceiling prices; (2) the Commission's regulations required refunds of amounts collected in excess of the maximum lawful price; and (3) well established law required that refunds be made at the earliest possible moment consistent with due

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[8] 15 U.S.C. § 717 *et seq.* (1982).

[9] *See also, Sunray Mid-Continent Oil Company v. FPC*, 364 U.S. 132, 147 (1960); *Public Service Commission of the State of New York v. FPC*, 543 F.2d 757 (D.C. Cir. 1974).

process—the mandate of the D.C. Circuit in *INGAA I* necessarily and implicitly included a requirement that the Commission order refunds at the earliest possible moment consistent with due process.

B. The Court Of Appeals Properly Considered Whether The Offset Provision Complied With Its Mandate

When AGD filed its motion to enforce the *INGAA I* mandate, it raised only a single issue—whether the offset provision of Order No. 399-A met the mandate of *INGAA I*. A court has inherent power to construe and enforce its mandate. *United States v. New York Telephone Company*, 434 U.S. 159, 172 (1970).[10] Once a court has construed its mandate, it has the power to issue such orders as are necessary to "effectuate and prevent the frustration of orders it has previously issued." *United States v. New York Telephone Company*, *supra*, 434 U.S. at 172.[11] These principles, ordinarily

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[10] *See also, Regal Knitwear Company v. NLRB*, 324 U.S. 9, 15 (1974); *New Jersey v. New York City*, 296 U.S. 259, 261 (1935); *In re Sanford Fork and Tool Company*, 160 U.S. 247, 255-256 (1895); *see also, Potomac Electric Power Company v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983); *American Trucking Associations, Inc. v. ICC*, 669 F.2d 957, 960 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *City of Cleveland, Ohio v. FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977); *Southern Natural Gas Co. v. FPC*, 543 F.2d 530, 532 (5th Cir. 1976); *Floersheim v. Engmen*, 494 F.2d 949, 954 (D.C. Cir. 1973); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

[11] *See also, In re Sanford Fork and Tool Company, supra*, 160 U.S. at 255; *Baltimore and Ohio Railroad Co. v. United States*, 279 U.S. 781, 785 (1929); *Potomac Electric Power Company v. ICC, supra*, 702 F.2d at 1032; *American Trucking Associations, Inc. v. ICC, supra*, 669 F.2d at 960 (and cases cited therein); *Oswald* v. *McGarr*, 620 F.2d 1190, 1195-96 (7th Cir. 1980); *City of Cleveland, Ohio v. FPC, supra*, 561 F.2d at 346; *Yablonski v. United Mine Workers of America*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

applied to a superior court's enforcing of its mandate *vis a vis* a lower court, are equally applicable to judicial review of administrative agency action undertaken pursuant to court order. *City of Cleveland, Ohio v. FPC*, 561 F.2d 344, 346-47 (D.C. Cir. 1977) ("these principles, so familiar in operation within the hierarchy of judicial benches indulge no exception for reviews of administrative agencies").[12]

Here, the D.C. Circuit in *INGAA II* clearly recognized that AGD had asked it only to decide whether the offset portion of Order No. 399-A complied with its mandate in *INGAA I* and, if not, to vacate that portion of the order. That is all the court did.[13] (Petitioners' Appendix at 7a). First, it determined what the law required and explained that its mandate necessarily included compliance with those requirements:

> The law requires the ordering of refunds at the earliest possible moment.
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> * * * *
>
> Two consequences of our decision are inexorable: implement the proper pricing method for future pricing decisions and remedy the effects of past use of the improper pricing method at the earliest possible moment.

Petitioners' Appendix at 12a, 17a. The court analyzed Order No. 399's prohibition of offsets and concluded that it complied with the court's mandate for the reasons

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[12] *See also, Regal Knitwear Company v. NLRB, supra*, 324 U.S. at 15; *American Trucking Associations, Inc. v. ICC, supra*, 669 F.2d at 960; *Floersheim v. Engmen, supra*, 494 F.2d at 953.

[13] Petitioners incorrectly state that AGD urged the court of appeals to exercise its extraordinary power under the All Writs Act, 28 U.S.C. § 1651 (1982), to issue a writ of mandamus (Petition at 5). AGD did not invoke the All Writs Act in its motion (see Appendix C), nor did the court do so in its decision and order in INGAA II.

which the Commission itself had stated in Order No. 399.[14]

The court analyzed the offset provisions of Order No. 399-A and determined that they did not meet the terms of the mandate. It found that the Commission's failure to explain why it so radically changed its mind constituted arbitrary and capricious action and violated the requirements of refunds at the earliest possible moment:

> The offset scheme embodied in Order No. 399-A will only further delay refund of the overcharges, circumventing our mandate in *Interstate* and the clear instruction of the Supreme Court in *Tennessee Gas.*

Petitioners' Appendix at 11a-12a. Having thus interpreted its mandate and found Order No. 399-A not to comply, the court granted the relief sought by AGD by issuing an order directing compliance with the mandate. In its order, filed March 5, 1985, the court explicitly stated:

> Upon consideration of the Motion of Petitioner Associated Gas Distributors to enforce this Court's mandate in the captioned cases and of the various responses thereto, and of petitioner's reply, and this Court having reviewed the record and the pleadings herein and having heard oral argument on the motion, it is

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[14] "FERC's prohibition of offsets was well considered. The controversy over production-related costs to be recouped by producers under Section 110 constitutes unsettled litigation wholly separate from the instant case. As such, permitting producers to offset their refund obligations would bring delay and confusion into an already complex area. Moreover, the principles of law and the customers involved in the refund arrangement are far from identical to those implicated in the Section 110 cost proceedings. By prohibiting offsets, FERC designed the system most likely to insure that customers will receive refunds due them. Involving disparate issues on a matter on appeal to another court may complicate, delay, and obfuscate the refunds at issue here." Petitioners' Appendix at 12a.

> ORDERED, by the Court, that the *motion by Associated Gas Distributors to direct compliance with the Court's mandate is herein granted* and that the Federal Energy Regulatory Commission is directed to vacate the offset portion of its Order No. 399-A, for the reasons set forth in its own order No. 399, in accordance with the Opinion for the Court filed herein this date.

Petitioners' Appendix at 131a, emphasis added.

There is no question that the court had the authority to do exactly what it did—to interpret its mandate and to enforce it. Its actions did not in any way depart from the accepted and usual course of judicial proceedings.

C. The Court Of Appeals' Action Was Appropriate Because The Commission Did Not Have Discretion To Establish Refund Provisions In Violation Of Applicable Law

Petitioners assert that mandamus could not lie because "the manner and timing of refunds" is purely discretionary. (Petition at 21-23). That principle is inapplicable to the facts of this case because the Commission does not have untrammelled discretion as to the manner and timing of refunds. First, refunds where the NGPA maximum lawful price is exceeded are *not* discretionary; they are mandatory.[15] Moreover, the Commission is limited by the concept of abuse of discretion and by the need to comply with other legal requirements affecting the manner and timing of refunds. The Commission's discretion, therefore, was limited by the legal requirement that refunds be made at the earliest possible moment consistent with due process. The court specifically determined that this legal requirement could not be met if offsets

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[15] See Section 504 of the NGPA, 15 U.S.C. § 3414 (1982) and implementing regulations at 18 C.F.R. § 270.101(e) (1985). See *supra* at p. 7 and n.7.

were permitted. It therefore found that the offset provision of Order No. 399-A constituted an abuse of discretion.

The Commission's "discretion" with respect to the manner of making refunds is also limited by the requirement that it give "due weight to considerations of equity" *Gillring Oil Company v. FERC*, 566 F.2d 1323, 1325-26 (5th Cir.), *cert. denied*, 439 U.S. 823 (1978) and that it engage in "broad" penetrating analysis of all the equitable considerations. *Public Service Commission of the State of New York v. FPC*, 329 F.2d 242 (D.C. Cir.), *cert. denied sub nom. Prado Oil and Gas Company v.* FERC, 377 U.S. 963 (1964). In that case, the court overturned a postponement of refunds because it found that the interests of consumers in prompt refunds outweighed the equitable considerations of the producers. The agency is also required to look at the "backdrop of practical consequences resulting from its refund order. *FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 155 (1962). What is more, the Commission must engage in reasoned decision making in arriving at its decisions. *Tenneco Oil Company v. FERC*, 571 F.2d 834 (5th Cir.), *cert. denied*, 439 U.S. 801 (1978).[16] Applying these principles, the D.C. Circuit has, in the past, specifically rejected an offset where it determined that the offset dealt with unrelated debts. *Cities Service Gas Company v. FPC*, 535 F.2d 1278 (D.C. Cir. 1976).

Here, the court determined that the reasoning in Order No. 399 satisfied the requirements for proper exercise of discretion with respect to the manner and timing of refunds. The decision in Order No. 399 to forbid offsets was an exercise of the Commission's limited discretion to decide the manner and timing of refunds—limited by the

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[16] *See also, Estate of L.D. French v. FERC*, 603 F.2d 1158, 1162-63 (5th Cir. 1979); *Texas Eastern Transmission Corporation v. FPC*, 414 F.2d 344, 347 (5th Cir. 1969) *cert. denied*, 398 U.S. 928 (1970); *Public Service Commission of the State of New York v. FPC*, 543 F.2d 757, 826 (D.C. Cir. 1974).

requirements of the mandate, the purpose and provisions of the law, and considerations of equity. Further, the court determined that the need to make refunds at the earliest possible moment was required by law and that the offset portion of Order No. 399-A did not meet that requirement. It also determined that the lack of reasoned decision making in Order No. 399-A constituted an abuse of discretion. For all these reasons, the court's decision to vacate the offset provision of Order No. 399-A was proper.

II. THE COURT'S DECISION TO TREAT AGD'S MOTION FOR AN ORDER DIRECTING COMPLIANCE WITH MANDATE AS A PETITION FOR REVIEW WAS PROPER

The court had well established precedent for its decision to treat AGD's Motion as a petition for review. *See INGAA II*, Petitioners' Appendix at 9a-11a. The cases cited by the court, as well as others cited below at 19-21, stand for the proposition that a motion to enforce mandate may be treated as an appeal provided that principles of finality and due process are not violated. Here, the court determined that either pleading could have been filed at that time,[17] the spirit of the notice requirements was fully met,[18] the relief sought was identical,[19] and the analysis required would be the same.[20] *See* Petitioners' Appendix at 10a-11a. It also found that, because the single issue before it had been briefed and argued, no one would be prejudiced by treating the matter as a petition for review. Under these circumstances, the court's determination to treat AGD's motion as a petition for re-

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[17] *U.S. v. Green*, 499 F.2d 538, 540, n.5 (D.C. Cir. 1974).

[18] *Rabin v. Cohen*, 570 F.2d 864, 866-67 (9th Cir. 1978); *see also*, 16 Wright & Miller, Federal Practice and Procedure § 3949 (1977).

[19] *Chase v. Robson*, 435 F.2d 1059, 1060, 1062 (7th Cir. 1970).

[20] *United States v. RMI Company*, 599 F.2d 1183, 1187-90 (3rd Cir. 1979).

view was not an abuse of discretion or a violation of law.[21]

In addition to arguing a lack of valid precedent, petitioners argue that the court lacked jurisdiction to reach the merits of the offset issue for three additional reasons: (1) exhaustion of administrative remedies—the requirement for seeking agency rehearing as required by Section 506 of the NGPA (15 U.S.C. § 3416); (2) venue —the allegation that the Fifth Circuit had exclusive jurisdiction and that the case should have been transferred there pursuant to 28 U.S.C. § 2112; and (3) the alleged invalidity of the court's action for a variety of due process complaints. Petitioners' arguments on each of these issues should be rejected for the following reasons.

A. The Purpose And Policy Of The NGPA Rehearing Requirement Was Fully Satisfied

The essence of the petitioners' argument is that the court lacked jurisdiction to reach the merits of the offset portion of Order No. 399-A because AGD's December 6, 1984 petition for rehearing had not been decided by FERC.[22] This argument is without merit because the purpose of the NGPA rehearing requirement had already been satisfied with the issuance of Order No. 399-A.

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[21] Petitioners, in their desire to discredit the court's action, totally mischaracterize one of the authorities cited by the court. See Petition at 20, n.29. In *National Organization for the Reform of Marijuana Laws v. Ingersoll*, 497 F.2d 654, 656, n.3 (D.C. Cir. 1974), the D.C. Circuit specifically treated a petition for mandamus as a petition for review. The hearing ordered in that case was not a prerequisite to appellate review. Rather, it was the relief sought by the petitioners because the agency had denied them a hearing on the merits.

[22] AGD had filed a protective request for rehearing of Order No. 399-A with FERC on December 6, 1984. It had also filed a protective Petition for Review in the D.C. Circuit on January 18, 1985. The Commission granted rehearing in Order No. 399-B issued July 18, 1985, in which the Commission vacated the offset provision of Order No. 399-A.

The rehearing requirement of 15 U.S.C. §§ 3416(a)(2) and (4) that a party seeking judicial review first seek rehearing before the Commission is concerned not with the formality of applying for rehearing but with the rationale that the agency has particular and specialized expertise that it ought to be allowed to exercise in correcting any errors it may have made before the court reviews agency proceedings. *Tenneco Exploration Ltd. v. FERC*, 649 F.2d 376, 378-79, n.1 (5th Cir. 1981). In addition, the rehearing requirement is intended to give the court the benefit of the agency's consideration of issues which involve technical questions of expertise.[23] The requirement for a rehearing as well as the companion principle that issues not raised before an administrative body may not ordinarily be raised before a reviewing court, are based on the principle of exhaustion of administrative remedies which is a prudential, not a jurisdictional, doctrine. In other words, while the statute may, under ordinary circumstances, require rehearing, that requirement is not absolute. As this Court pointed out long ago in *Hormel v. Helvering*, 312 U.S. 552, 557 (1941), "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them." So, for example, in *Arkansas Power and Light Co. v. FPC*, 517 F.2d 1223, 1236-37 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 933 (1976), the court stated:

> [T]he exhaustion of remedies doctrine which is expressed in the statute[24] is not inflexible; it allows

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[23] *See, e.g., FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 500-501 (1955); *Whitney National Bank In Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965); *ECEE, Inc. v. FERC*, 611 F.2d 554, 556 (5th Cir. 1980); *Public Service Commission of the State of New York v. FPC*, 543 F.2d 757, n.116 (D.C. Cir. 1974); *Hennesey v. SEC*, 285 F.2d 511, 515 (3rd Cir. 1961).

[24] Section 19(b) of the NGA, 15 U.S.C. § 717(r), which is, in all material respects, identical to Section 506 of the NGPA.

> for deviation where the interests of justice dictate [citations omitted].

If seeking rehearing would be futile in light of prior agency action, the court may waive the requirement.[25] As the court stated in *Public Service Commission of the State of New York v. FPC, supra*, 543 F.2d at 775, n.116:

> [M]odification of a prior administrative decision on rehearing does not generate a need to request *another* rehearing where the litigant has already presented his point to the Commission for decision. (Emphasis added.)

See also, 4 K. Davis, Administrative Law Treatise (2d ed.) §§ 26.7 and 26.11 (1983).[26]

Here, the purpose of the rehearing requirement had been more than adequately met. The Commission, in the NOI, had invited all interested parties to comment on the refund procedure. Those comments included discus-

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[25] *See, e.g., U.S. Alkali Export Association, Inc. v. United States*, 325 U.S. 196, 210 (1945); *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587 (1926); *Hudson v. Farmers Home Administration*, 654 F.2d 334, 337 (5th Cir. 1981). *See also Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle*, 571 F.2d 359, 364 (7th Cir.), *cert. denied*, 439 U.S. 834 (1978) (prior agency action).

[26] A good illustration of this principle is found in *Department of Fish and Game of the State of California v. FPC*, 359 F.2d 165, 169 (9th Cir.), *cert. denied*, 385 U.S. 932 (1966). There, petitioner sought mandamus to enforce the court's mandate *without* seeking rehearing of the latest in a series of orders. The court stated that since the rehearing requirement of Section 313 of the Federal Power Act, 16 U.S.C. § 825*l* had not been met, it could refuse to consider the appeal, but the facts were such that the petitioner had reasonably concluded that filing a petition for rehearing would be "meaningless". The court, therefore, proceeded to decide the issue on the merits. Petitioners cite this case on page 15 of their Petition for the proposition that, even when seeking mandamus, rehearing must first be sought and ruled upon. As the discussion here demonstrates, petitioners have completely missed the point of this case and its holding.

sion of the offset issue. In its comments on the interim rule, AGD discussed in detail reasons why an offset would be inequitable and inappropriate. See Respondents' Appendix B. AGD having raised its concerns before the Commission in this forum, "FERC was adequately apprised of the petitioner's contentions" and the purpose of the rehearing requirement as to the offset issue was amply met. *Tenneco Exploration Ltd. v. FERC*, *supra*, 649 F.2d at 378-79, n.1.

The Commission cited many of AGD's reasons as justification for its denial of offsets in the final rule, Order No. 399. Having carefully considered the offset issue there, the Commission considered it again in response to the producers' requests for rehearing. Order No. 399-A was the result of that reconsideration. It can thus hardly be claimed that the agency did not have ample opportunity to bring its expertise to bear on the offset issue. Having reached one conclusion and then, upon reflection, having reversed itself, it was not likely that the Commission would change its position yet a third time. Seeking rehearing would therefore have been futile.

Both because the purpose of the rehearing requirement was amply met and because it would have been futile to seek rehearing, the action of the D.C. Circuit in not requiring agency action on a petition for rehearing before considering AGD's Motion as a petition for review was well within the accepted and usual course of judicial proceedings.

B. Venue Was Proper In The Court Of Appeals

Petitioners' argument that the court lacked venue is wrong for three reasons. *First*, such a conclusion is belied by the very language of the judicial review provision that they invoke in their aid. Section 506(a)(4) of the NGPA provides in pertinent part:

> Upon the filing of such *petition* such court shall have jurisdiction, which *upon the filing of the record with*

> *it shall be exclusive*, to affirm, modify, or set aside such order in whole or in part (emphasis added).

AGD filed its protective petition for review in the D.C. Circuit on January 18, 1985, before the record had been filed in the Fifth Circuit and before the court acted in *INGAA II*. The lack of a filed record, therefore, meant that neither the Fifth Circuit nor the D.C. Circuit had *exclusive* jurisdiction. Both circuits had appropriate venue.

Petitioners' second argument—that 28 U.S.C. § 2112 (1982) required transfer to the Fifth Circuit—is also without merit.[27] Section 2112(a) is simply a rule of comity designed to prevent unseemly conflict among the circuits. All that was pending before the D.C. Circuit was a determination of what was contained in the *INGAA I* mandate and whether the offset provisions of Order No. 399-A complied with it. Comity would have been violated if the Fifth Circuit *had* attempted to decide what the D.C. Circuit's mandate meant. The Fifth Circuit's decision to delay the filing of the record was an implicit recognition of this fact and a determination on its part not to seek exclusive jurisdiction of the issues until the D.C. Circuit had decided, as only it could, whether Order No. 399-A violated its mandate in *INGAA I*.

Petitioners' Section 2112 argument must also fail because the venue provisions of 28 U.S.C. § 2112 are subject to an exception which specifically encompasses the facts of this case. Even if one accepts petitioners' assertions that their petitions for review in the Fifth Circuit constituted the first filed appeals, a subsequently filed appeal need not be transferred to the court of first filing

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[27] In light of the Fifth Circuit's recent transfer of Petitioners' pending petitions for review of Order Nos. 399, 399-A, and 399-B to the D.C. Circuit, petitioners' transfer and venue arguments are moot.

> [W]here the same or inter-related proceeding was previously under review in the Court of Appeals, and is now brought for review of an order entered after remand, or in a follow-on phase, where continuance of the same appellate tribunal is necessary 'to maintain continuity in the total proceeding.'

Public Service Commission for the State of New York v. Federal Power Commission, 472 F.2d 1270, 1272 (D.C. Cir. 1972) citing *Pacic Gas and Electric Company v. Federal Power Commission*, 272 F.2d 510, 511 (D.C. Cir. 1958). Sequential regulations that arise from the same or irreleated proceedings are normally considered the same order for purposes of 28 U.S.C. § 2112(a).[28]

Here, all the Btu measurement and refund issues dealt with in Orders No. 93, 93A, 399, and 399-A had been decided by the D.C. Circuit. The only question before the D.C. Circuit in *INGAA II* was whether its mandate in *INGAA I* had been properly carried out. That court was the only one competent to make that determination. It was, therefore, perfectly proper for the D.C. Circuit not to transfer this action to the Fifth Circuit.

Petitioners' argument that 28 U.S.C. § 2112 was violated because the D.C. Circuit's action resulted in piecemeal review is also without merit. The concept of piecemeal review ordinarily applies to judicial review before agency action is complete. *See, e.g., Cities of Anaheim and Riverside, California v. FERC*, 692 F.2d 773 (D.C.

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[28] *See, e.g., BASF Wyandotte Corp. v. Costle*, 582 F.2d 108, 112 (1st Cir. 1978); *Public Service Commission for the State of New York v. FPC, supra*, 472 F.2d at 1272; *Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission*, 598 F.2d 759, 766-67 (3rd Cir. 1979); *Eastern Airlines, Inc. v. CAB*, 354 F.2d 507, 510-11 (D.C. Cir. 1965). *See also, ITT World Communications, Inc. v. FCC*, 621 F.2d 1201, 1208-09 (2nd Cir. 1980); *American Public Gas Association v. FPC*, 555 F.2d 852, 857 (D.C. Cir. 1976); *Farah Manufacturing Co., Inc. v. NLRB*, 481 F.2d 1143, 1145 (8th Cir. 1973).

Cir. 1982); *Pennzoil Co. v. FERC*, 742 F.2d 242 (5th Cir. 1984). The danger sought to be avoided is the waste of judicial and administrative time and resources that may result from judicial intervention before the agency has had an opportunity to act fully and finally. Here, the Commission's action was clearly final. The issues raised in the Fifth and the D.C. Circuits were separate and distinct. There was, therefore, no opportunity for the dangers associated with piecemeal review to arise. What is more, as demonstrated above, if transfer were needed to prevent piecemeal review, the Fifth Circuit could legitimately have been obliged to transfer petitioners' appeals to the D.C. Circuit "in the interest of justice." 28 U.S.C. § 2112(a) (1982). The Fifth Circuit's recent transfer of all the Btu refund proceedings to the D.C. Circuit fully supports this view. For all these reasons, the purpose of 28 U.S.C. § 2112 was fully satisfied.

Finally, even if venue had been initially proper only in the Fifth Circuit, that court had inherent jurisdiction, independent of 28 U.S.C. § 2112, to transfer any case to any other circuit in which jurisdiction and venue *could* be proper "in the interests of justice and sound judicial administration." *Eastern Airlines, Inc. v. CAB*, *supra*, 354 F.2d at 510-511.[29] The Fifth Circuit's decision to forego exclusive jurisdiction by delaying the filing of the record in order to allow the D.C. Circuit to explain what its mandate meant and to decide whether it had been violated was apparently the first step in making such a determination. It has now completed the process by transferring all outstanding Btu refund appeals to the D.C. Circuit. Accordingly, neither its actions nor

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[29] *See also, Pearce v. Director, Office of Workers' Compensation Programs*, 647 F.2d 716, 720, n.3 (7th Cir. 1981); *Dayton Power & Light Co. v. EPA*, 520 F.2d 703 (6th Cir. 1975); *Natural Resources Defense Council v. EPA*, 465 F.2d 492, 495-96 (1st Cir. 1972); *Panhandle Eastern Pipe Line Co. v. FPC*, 343 F.2d 905, 909 (8th Cir. 1965).

that of the D.C. Circuit were improper or an abuse of discretion.

For all these reasons, the court's decision to treat AGD's Motion as a petition for review of the offset issue, and the Fifth Circuit's acquiescence and cooperation in that determination, did not constitute a violation of either the letter or the spirit of 28 U.S.C. § 2112.

C. The Court's Decision To Treat AGD's Motion As A Petition For Review Did Not Violate Producers' Due Process Rights

Petitioners argue that the court's action in deciding whether its mandate had been complied with has resulted in piecemeal review that has somehow denied them the opportunity to be heard at a meaningful time and in a meaningful manner (Petition at 19). This contention is without merit. As petitioners admit, the "meaningful time and place" argument applies only when a party is to be deprived of significant property rights. *See* cases cited at Petition, p. 19.

Here, Petitioners have not been deprived of any property rights. The court's order did absolutely nothing to the amounts owed by petitioners;[30] it merely affected the timing of payments. Not surprisingly, petitioners have cited no authority for their claim that the timing of payments they owe someone else rises to the level of a property right. Petitioners have therefore misapplied the due process doctrine.

Petitioners' argument that they were denied due process because the court did not have the full administrative record before it is similarly without merit. The court's determination that the offset portion of Order

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[30] Petitioners' claim that if they could argue everything in one jurisdiction they would somehow save "additional refunds" of $450 million is, to put it in its best light, disengenuous. *All* that is involved here is the timing and manner of refunds, *not* the amounts.

No. 399-A did not comply with its mandate was based on its determination that while Order No. 399 was the product of reasoned decision-making, Order No. 399-A was not. That is a determination made from the *face* of the order under review, *i.e.*, from an evaluation of the reasoning engaged in, and the support actually claimed for, the results reached.[31] If the decision of the agency does not clearly articulate a "rational connection between the facts found and the choice made," the decision is arbitrary and capricious and may not stand. *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1499 (D.C. Cir.), *cert. denied sub nom. Texas Eastern Transmission Corp. v. Farmers Union Central Exchange, Inc.*, —— U.S. ——, 105 S.Ct. 507 (1984), quoting *Burlington Trunk Lines v. United States*, 371 U.S. 156, 168 (1962). *See also, American Public Gas Association v. FPC*, 567 F.2d 1016, 1029-30 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978). The record relevant to such a determination, therefore, is the order itself. Here, it was the comparison of Order Nos. 399 and 399-A that revealed the fatal flaw. The D.C. Circuit, therefore, had all the record it needed to reach the decision it reached.

CONCLUSION

Petitioners conclude that *INGAA II* stands for the proposition that parties dissatisfied with administrative agency action no longer need standing, no longer need to request rehearing, no longer need to file a petition for review and no longer need a record on appeal before

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[31] *See, e.g., Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, —— U.S. ——, 103 S.Ct. 2856, 2866, 2869-71 (1983); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1500, 1511 (D.C. Cir.), *cert. denied sub nom. Texas Eastern Transmission Corp. v. Farmers Union Central Exchange, Inc.*, —— U.S. ——, 105 S.Ct. 507 (1984).

seeking judicial review. (Petition at 9) They also conclude that *INGAA II* has such broad applicability that "it will fundamentally change the relationships among federal agencies and reviewing courts, among the various courts of appeals, and among parties before agencies" and, as a result, will have a "broad, deleterious effect on judicial review of administrative decisions generally." (Petition at 9-10).

Such hyperbole and exaggerated rhetoric do not advance the cause of meaningful judicial review in this Court. *INGAA II* does not stand for any of these propositions. It stands plainly and simply for the propositions that a court always has jurisdiction to interpret and enforce its own mandate and that the particular facts of the situation will control the extent to which procedural formalities may be modified in the interests of sound judicial administration and equity.

Here, the Commission had fully considered the single substantive issue—the propriety of offsets—on two previous occasions. The sole question before the court of appeals was whether the offsets provided for in Order No. 399-A complied with the *INGAA I* mandate. Both the D.C. Circuit and the Fifth Circuit determined that the review of that question would be better accomplished in the D.C. Circuit. Full and complete review of that issue was had in the D.C. Circuit. It was completely irrelevant whether the court called its deliberations a review upon motion to enforce mandate or a review on the merits upon petition for review. The results reached were fully supportable in either case and comported with all appropriate considerations of judicial comity, exhaustion of administrative remedies, standards of sound judicial administration, and the applicable laws—*i.e.*, the NGA, the NGPA, and 28 U.S.C. § 2112—all as construed by the courts. The D.C. Circuit's actions, therefore, were not in any way a departure from the accepted and usual course of judicial proceedings.

AGD, therefore, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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August 26, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 81-1690

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner

MOBIL OIL CORPORATION, *et al.*,
Intervenors

And Consolidated Cases

[Filed Apr. 25, 1984]

Before: ROBINSON, *Chief Judge*; MIKVA and SCALIA, *Circuit Judges*

ORDER

Petitioner's motion for an order directing compliance with our mandate in the above captioned case is *DENIED*.

Petitioner has not established that the agency is in breach of its obligation to direct the payment of refunds as soon as proper and expedited agency process allows. *See generally Federal Power Commission v. Tennessee*

Gas Transmission Co., 371 U.S. 145 (1962); *Public Service Commission of the State of New York v. Federal Power Commission*, 543 F.2d 757 (D.C. Cir. 1974).

Our denial is without prejudice to Petitioner's filing a subsequent motion if clear indication of agency compliance with our mandate, such as publication of a time schedule for a refund procedure, is not forthcoming at an early date.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RM84-6-000

REFUNDS RESULTING FROM BTU
MEASUREMENT ADJUSTMENTS

COMMENTS OF ASSOCIATED GAS DISTRIBUTORS ON THE INTERIM RULE

Associated Gas Distributors (AGD) submits the following comments on the Commission's Interim Rule issued May 3, 1984. AGD appeared at the May 24, 1984 public hearing and participated in one of the panel discussions conducted by the Commission at the hearing. The purpose of these comments is to address several issues raised by the participants at the public hearing, particularly the proposal of the Indicated Producers and Tennessee Gas Pipeline (Tennessee) that refunds resulting from Order No. 93 be offset by amounts which the producers have billed the pipelines for production-related activities as defined in Order No. 94-A and the related orders implementing Section 110 of the Natural Gas Policy Act of 1978 (NGPA). For the reasons stated below, AGD urges the Commission to reject this offset proposal.

First, however, AGD wishes to state, as it did at the public hearing, that it strongly supports the Commission's Interim Rule and urges the Commission to adopt it without modification as the final rule for Btu refunds. The Interim Rule presents a balanced answer to the three critical points on which the Commission sought comment in its January 19, 1984 Notice of Inquiry: the timing, method, and monitoring of Btu refunds. The refund pro-

cedures established in the Interim Rule are far more expeditious than the four-step procedure contemplated in the Commission's initial Notice of Inquiry. The periods within which large and small producers are required to make refunds to their customers provide adequate protection to the producers and at the same time satisfy the Commission's duty to direct payment of refunds at the earliest possible moment consistent with due process.[1] The Interim Rule requirement that pipelines make cash refunds to their customers strikes a balance between considerations of the administrative simplicity of making refunds via the PGA mechanism on the one hand, and the more important considerations of refunding overcharges to those who actually paid them, avoiding disruption of inter-pipeline market competition, and efficient monitoring of the refund process at both the federal and state level, all of which clearly favor the lump-sum cash payment procedure ordered by the Commission. The Interim Rule, in short, presents a reasonably prompt and fair basis for compliance with the Court's mandate in this matter and should be adopted substantially in its present form as the Commission's final rule.

The Proposal to Offset Order 93 Refunds Should be Rejected

At the May 24, 1984 public hearing, both the Indicated Producers and Tennessee proposed modifications to the Interim Rule to permit a producer or a pipeline to offset Btu measurement refunds owed to their customers with amounts billed by the producers for production-related activities. The Indicated Producers request that

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[1] *See United Gas Improvement Company v. Callery Properties,* 382 U.S. 223, 230 (1965), *quoting Federal Power Commission v. Tennessee Gas Transmission Co.,* 371 U.S. 145, 155 (1962); *see also Public Service Commission of the State of New York v. Federal Power Commission,* 543 F.2d 757 (D.C. Cir. 1974); *Atlantic Refining Co. v. Public Service Commission of the State of New York,* 360 U.S. 378, 388 (1959).

the Commission modify the Interim Rule to permit the producer the right to offset any Btu refunds with production-related charges billed by the producer to its pipeline customers. Tennessee requests a modification of the Interim Rule to permit interstate pipelines to flow through Btu refunds by credit to Account 191 and to offset the refund amounts due to their customers with production-related charges invoiced by the producers.

The Interim Rule permits the producers to make refunds to their pipeline customers by means of billing adjustments if the pipelines agree to that method. If the pipelines refuse, then the producers must make the refunds by lump-sum cash payment. A producer, therefore, cannot offset the Order 93 Btu refunds with production-related charges unless the pipeline (or other first sale purchaser) agrees to this method or the Commission grants the seller the right to such an offset in the final rule.

AGD urges the Commission not to grant such a right. If the Commission modified the Interim Rule to grant producers the right to offset Btu refunds with production-related claims (or any other claims in dispute), the Commission would intrude upon, and possibly upset, the parties' negotiating positions regarding the amounts which are properly owed for production-related claims (or any other claims in dispute). Moreover, offsetting Btu refunds with amounts claimed for production related activities would considerably complicate the Commission's and the States' monitoring of the Btu refund process.

AGD has even greater concern with Tennessee's proposal that pipelines be permitted to offset Order 93 refunds to their customers with production-related claims accumulated by Tennessee. AGD urges the Commission not to mix Order 93 refunds and production-related claims for the same sound policy reasons enunciated in the Interim Rule (mimeo at pp. 18-19) in favor of requiring cash payment of refunds by pipelines to their customers

instead of a reduction in purchased gas costs for the future. In fact, each of the reasons cited by the Commission for requiring lump-sum cash refunds applies with equal force to the question of whether Btu refunds should be offset by amounts claimed for production-related activities. Those reasons will be discussed in order below.

An Offset of Btu Overcharges Will Penalize Those Entitled to Refunds

The first reason cited by the Commission for favoring cash refunds by pipelines to their customers is that the refunds should be made so far as possible to those who actually paid the Btu overcharges. A refund of these overcharges through the PGA mechanism would not return the dollars to those who paid them because of seasonal disparities in purchasing patterns but even more important because of substantial changes in purchasing patterns by pipeline customers through two or three future PGA periods relative to the purchasing patterns during the periods when the Btu overcharges were paid.

For several reasons, an offset of Btu refunds with production-related charges would result in a mismatch of those entitled to Btu refunds and those who may be responsible for a share of production-related charges. First, the periods during which Btu surcharges and production-related charges apply are substantially different. Order 93 permitted Btu's to be measured on a "dry" basis for all volumes sold from December 1, 1978, to January 19, 1984. By comparison, Order 94-A permits the retroactive collection of delivery and compression allowances from July 25, 1980 to the present. Thus, Btu surcharges apply to gas volumes purchased for a period of approximately twenty months before producers were entitled to claim any production-related allowances for delivery and compression activities. Moreover, Btu measurement on a "dry" basis has been prohibited since January 19, 1984; therefore, surcharges on volumes purchased since then

would not have been collected by the pipelines. In fact, some pipelines may have ceased collecting Btu surcharges shortly after the Court's decision vacating the "dry" Btu rule on August 9, 1983. In short, the periods during which volumes of gas purchased from pipelines were subject to Order 93 surcharges and production-related charges are substantially different, and any attempt to match the two would be artificial and unfair to those who paid Btu measurement overcharges.[2]

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[2] Tennessee argues that a mismatch would not occur in its case. At the May 24 public hearing, Tennessee argued that the percentage of its total sales volumes taken by those customers who paid most of the Btu overcharges did not change appreciably during the period January 1982 through January 1984. Tennessee, therefore, concludes that it would be fair to offset production-related claims applicable to that period against Order 93 refunds.

Tennessee's argument is deficient in several respects. First, a customer's percentage of Tennessee's total sales may have remained relatively stable from 1982 to 1984 while its takes from Tennessee in absolute terms may have varied considerably because of substantial swings in Tennessee's total sales during that period. Tennessee's argument is further deficient because it offers no projection of what each customer's purchases may be, either in absolute terms or as a percentage of Tennessee's total sales, during the next two or three PGA periods when Tennessee would flow through the accumulated production-related charges. In fact, a certificate application filed by Tennessee on May 24, 1984 (Docket No. CP84-441), the same day on which it presented its offset proposal at the public hearing, Tennessee proposed several major shifts in the contract demands of its customers. For example, Tennessee proposes a reduction of about 232,000 dt per day in the maximum daily quantities to be sold to Columbia Gas Transmission Corporation; an increase in the contract demand of Public Service Electric & Gas Company from 35,700 Mcf per day to 88,000 dt per day—an increase of over 100 percent; and an increase in the contract demand of Granite State Gas Company from 84,000 Mcf per day to 127,000 dt per day—a growth of approximately 50 percent. Tennessee, therefore, has failed to establish that an offset of Btu refunds with accumulated production-related claims over the next two or three PGA periods would be fair to those customers who paid the Btu overcharges.

An Offset of Btu Refunds Would Disrupt Current Market Forces

Offsetting Btu refunds with production-related charges would also distort competition among pipelines. One of the reasons cited by the Commission for requiring cash refunds by pipelines to their customers rather than a PGA flow-through is that cash refunds will be least disruptive of current natural gas market forces. Interim Rule, mimeo, at 18-19. As certain commenters pointed out in their response to the Commission's Notice of Inquiry, permitting a pipeline with substantial Btu refund responsibility to flow through those refunds by reductions in its PGA could give that pipeline an artificial competitive advantage over pipelines with substantially less Btu refund responsibility.[3]

An offset of Btu refunds with accumulated production-related charges via the PGA flow-through mechinism [sic] would have the same disruptive effect on competitive market forces that the Commission recognizes in the Interim Rule and in its Notice of Inquiry on PGA revisions. If pipelines were permitted to offset Btu refunds with production-related claims, a pipeline like Tennessee with substantial Btu refund responsibility and even greater accumulated production-related claims, could take advantage of the offset privilege to escape difficult negotiat-

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[3] The Commission sounded a similar note in its April 27, 1984 Notice of Inquiry in Docket No. RM84-12-000, "Revisions to PGA Regulations", where the Commission stated:

> For example, the [PGA] flow-through of large refunds from a period substantially longer than six months may result in an unfair competitive advantage for the pipeline. The proposed PGA adjustment will reflect the refund, but not accrued increases in gas costs. Thus, the refunding pipeline's commodity rate could temporarily undercut a competing pipeline's rate, despite the fact that the refunding pipeline's underlying costs of gas is higher than its competitor's.

Notice of Inquiry, mimeo, at 11-12. The Commission further observed that "a lump-sum cash refund avoids distortion of market signals and unfairness to the pipeline's competitors." *Id.* at 13.

ing decisions with its producer-suppliers and marketing decisions with respect to what its markets could tolerate in PGA pass-throughs. An offset privilege would permit Tennessee to use the Btu refunds owed to it by its producer-suppliers as a fund for the settlement of possibly all of its accumulated production-related claims with the result that Tennessee could gain a substantial competitive advantage unrelated to its efforts to reduce purchased gas costs.

An offset of Btu refunds with accumulated production-related claims would not only disrupt competitive market forces at the pipeline marketing level, it could also disrupt the bargaining positions of producers and pipelines regarding the allowability of production-related charges claimed by the producers. The record in this proceeding indicates that many pipelines, including Tennessee, have paid little or none of the production-related charges invoiced by the producers. Tennessee stated that it has been invoiced approximately $125 million in production-related charges, which it has been reviewing (Tr. 86), and that its potential liabilty for retroactive surcharges could approach $200 to 250 million (Tr. 46, 92). During the May 24 hearing, the producers stated that the pipelines have generally not been paying amounts billed by the producers for production-related activities (Tr. 117-19, 125-26). The evidence indicates, therefore, that pipelines have accumulated large amounts of retroactive production-related surcharges, although the Commission in Order 94-A directed producers and pipelines to spread the collection of retroactive gathering and compression allowances as evenly as possible over 1983 and 1984.[4]

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[4] Despite this accumulation of unpaid production-related charges, there is no indication that the producers have taken legal action to recover these amounts from their pipeline customers, as they have in certain other cases, when pipelines have refused to take or pay for gas at levels provided in contracts with their producer suppliers. There is evidence in other proceedings that the pipelines have disputed the producers' contractual authority to collect

Whatever the reasons for the accumulation of unpaid production-related claims, the matter appears to be complicated, and the Commission ought not to upset the relative bargaining positions of the parties by permitting an offset of production-related claims against Btu refunds due. The Commission certainly has no obligation to do so. Contrary to the statement of the Indicated Producers at the hearing, the Commission's duty with respect to collection of production-related allowances is clearly not the same as its duty with respect to refunds of Btu overcharges. In the series of orders implementing Section 110 of the NGPA, the Commission simply identified those production-related activities for which producers could recover costs incurred, provided that they have express contractual authority to do so. The Commission has no obligation to *assure* the producers' recovery of such costs; rather it has a duty to assure that any recovery of such costs in addition to the applicable ceiling price meets the requirements of Section 110 of the NGPA. By comparison, the Commission's duty to enforce the ceiling price provisions of the NGPA is clear in Section 504 of that Act. The Commission, therefore, has an obligation to see to it that Btu refunds are made; it has no corresponding obligation to assure the producers' recovery of production-related charges where such amounts are in dispute.

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production-related allowances, even delivery allowances for which the Commission found an area rate clause to be sufficient contractual authority in Order 94-A. See, *e.g.*, Request of Crystal Oil Company for an Interpretation of the General Counsel, filed June 13, 1983; Petition for Reconsideration and Clarification of Michigan Wisconsin Pipe Line Company, filed in Docket Nos. RM80-47-002, *et al.* on June 23, 1983. In addition, the Joint Docketing Statement of Pipeline Petitioners in the Consolidated Petitions for Review of Order No. 94-A *et seq.* includes the following issue: "Whether the Commission erred in determining that an area rate clause in a gas purchase contract constitutes contractual authority to collect delivery allowances regardless of the actual intent of the contracting parties."

Two other reasons cited in the Interim Rule in favor of cash refunds apply with equal force to the question of offsetting Btu refunds with production-related charges. The Commission noted that cash refunds to pipeline customers would give greater flexibility to State agencies to assure that consumers who paid the overcharges receive the refunds. The Commission further noted that cash refunds would facilitate monitoring of the refunds at both the federal and state levels. State public service commissions are anticipating substantial refunds from Btu overcharges; the Interim Rule schedule calls for refunds to reach distribution companies between November 1 and December 1, just in time for the State agencies to direct a cash refund or a reduction in winter rates for consumers. An offset of Btu refunds with production-related charges would upset those expectations, confuse the issues and unnecessarily complicate the monitoring of the Btu refund process.

In summary, pipelines should not be permitted to offset Btu refunds with accumulated production related charges. All of the reasons cited in the Interim Rule for requiring cash refunds to pipeline customers rather than PGA flow-through also favor segregating Btu refunds and production-related claims. Mixing the two will inevitably upset the sound refund policy adopted by the Commission in the Interim Rule.

Secondary Pipelines Should Not Be Exempted From the Cash Refund Rule

At the May 24 public hearing, Columbia Gas Transmission Corporation (Columbia) proposed that secondary pipelines be exempt from the cash refund requirement and be permitted to flow refunds received from other pipelines through their PGA's. Columbia cited the administrative burden of processing checks to its customers following receipt of refunds from its pipeline suppliers. Columbia's burden appears no greater than other pipe-

lines, many of whom have multiple pipeline suppliers. Moreover, Columbia fails to show that the administrative burden of processing refunds from pipeline suppliers will be substantially greater than processing refunds from producer-suppliers; yet Columbia asks no exemption from the cash refund requirement for producer-supplier refunds. Columbia's proposal should be denied.

The Commission Lacks the Power to Order Flow-Through at the State Level

At the May 24 public hearing, the Industrial Groups urged the Commission to amend the Interim Rule to require flow-through of Btu refunds at the State level to industrial users. The Industrial Groups argued that Sections 501 and 504 of the NGPA give the Commission the authority to order such a flow-through without conflict with the jurisdiction of State public service commissions. Neither section grants the Commission the power to override State governmental authorities in matters relating to the disposition of refunds.[5] Moreover, where Congress intended to grant the Commission the power to review State agency determinations, as it did in Section 503 of the NGPA, or to pre-empt State and local law, as it did in Section 205(d) of the NGPA regarding passthrough of incremental pricing surcharges to distribution company customers, the intent of Congress was clear and unequivocal. Neither Section 501 nor 504 of the NGPA grants the Commission sovereign power over the disposition of refunds at the State and local level. The proposal of the Industrial Groups, therefore, should be denied.

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[5] The Industrial Groups cite a sentence in the NGPA Conference Report discussion of Section 504. The report states that the Commission's authority pursuant to this Section includes the authority to require refunds from any person. This power, of course, in no way implies that the Commission also has authority to override State governmental authorities in the disposition of refunds at the State or local level.

Reports Should Not Be Required From Local Distribution Companies

In the Interim Rule, the Commission declined to require refund reports from local distribution companies because producer sales to such entities comprise a small portion of the total sales subject to Btu overcharges. The Commission nevertheless requested comment on whether it should require reports from all first-sale purchasers including local distribution companies, Hinshaw pipelines and end-users. AGD concurs in the reason cited by the Commission for declining to require reports from such entities and further suggests that the burden of producing such reports would far outweigh any benefit which might result from producing them. In addition, local distribution companies will likely be required to file reports with State authorities. It would be particularly burdensome for these entities to be subject to producing two different reports for federal and state authorities.

Conclusion

For the reasons stated above, AGD urges the Commission to adopt its Interim Rule without modification as the Final Rule in this matter.

Respectfully submitted,

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Dated: June 21, 1984

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 81-1690, *et al.*

INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

MOTION OF PETITIONER ASSOCIATED GAS DISTRIBUTORS FOR ORDER DIRECTING COMPLIANCE WITH MANDATE

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Rule 6 of this Court, Petitioner Associated Gas Distributors (AGD)* moves this Court for an order directing Respondent Federal Energy Regulatory Commission (FERC) to comply with this Court's mandate. In support of this motion, AGD states as follows:

1. On August 9, 1983, this Court issued its decision vacating FERC's "dry Btu rule", as then embodied in 18 C.F.R. Section 270.204, on the grounds that such rule was "fundamentally at odds with the Btu measurement technique implicit in the NGPA" (Natural Gas Policy Act of 1978). 716 F.2d at 15.

2. On December 8, 1983, this Court issued its mandate in these proceedings and denied FERC's motion for

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* The companies known as Associated Gas Distributors are listed in Appendix A.

a continuation of the stay of the issuance of the mandate. In a memorandum accompanying its December 8, 1983 order, this Court found that FERC had not established good cause for an extension of the stay.

3. On December 14, 1983, AGD filed motions in several pipeline proceedings at FERC, requesting the Commission to issue orders directing the pipelines to make immediate rate reductions to eliminate future overcharges resulting from erroneous Btu measurement techniques and to refund past overcharges in order to implement this Court's judgment and mandate. In these motions, AGD cited the irreparable harm which had resulted from past overcharges and the compounding of that injury if those overcharges were not immediately terminated and refunds ordered.

4. On January 13, 1984, FERC responded to AGD's motions for immediate relief in conformity with this Court's mandate. The Commission issued a notice stating that it intends to act on the Court's decision "*including the refund consequences of the Court's decision*, generically, and hereby gives notice of its intention to act on AGD's motions at that time". (Emphasis added.) A copy of this notice is attached as Appendix B.

5. On January 19, 1984, FERC issued its Order No. 356 in Docket No. RM80-33-001. This order revised the Commission's regulations in response to this Court's mandate by providing that the Btu content of natural gas must be measured on a "wet" basis rather than a "dry" basis (as provided in regulations vacated by this Court), effective as of December 1, 1978 (the effective date of NGPA).

6. Also on January 19, 1984, FERC issued a Notice of Inquiry ("NOI") in Docket No. RM84-6-000, entitled "Refunds Resulting From Btu Measurement Adjustments". In this NOI, FERC requested public comment on procedures it might adopt to govern *refunds for over-*

charges during the period December 1, 1978 to January 19, 1984. A copy of this NOI is attached as Appendix C.

7. On May 3, 1984, FERC issued an Interim Rule requiring refunds of Btu overcharges by natural gas producing companies. According to this Interim Rule, "first sellers" of natural gas (gas producers) were required to refund their Btu overcharges with interest on November 5, 1984 (the date set for "large producers") or May 3, 1985 (the date set for "small producers"). Interstate pipelines were required promptly to pass on these refunds in lump sum payments to those customers actually overcharged as a result of the Commission's vacated "dry Btu" orders.

8. On September 20, 1984, FERC issued its Order No. 399 adopting as a "Final Rule" the May 3 Interim Rule with certain clarifications and modifications. This order, which denied rehearing of the Interim Rule, *specifically prohibited offsets* of the Btu measurement overcharges (Btu refunds) and production-related costs permitted under Section 110 of NGPA. As in the case of the Interim Rule, this Final Rule required "large" first sellers to pay refunds on November 5, 1984; "small" first sellers were required to pay their refunds by May 3, 1985. A copy of Order No. 399 is attached as Appendix D.

9. On October 24, 1984, FERC issued its "Order Granting Stay and Rehearing for the Purpose of Further Consideration" in Docket No. RM84-6-003, thereby postponing the effectiveness of Order No. 399 "until the tenth day following issuance of our order disposing of the petitions for rehearing". The Commission explained in this order that it wanted to consider all petitions for rehearing of Order No. 399 and that a "limited stay" of Order No. 399 was necessary for that purpose.

10. On November 20, 1984, FERC issued its Order No. 399-A in Docket No. RM84-5-003. In this order "granting in part and denying in part rehearing" of Or-

der No. 399, the Commission (by a vote of 3-to-2) adopted a substantial and dramatic modification of its September 20 "Final Rule" requiring "large producer" refunds of Btu overcharges by November 5, 1984. Specifically, Order No. 399-A announces two major changes in the refund procedures previously adopted: *First*, the deadline for large producers' refund payments was extended to December 31, 1984. *Second*, in lieu of a cash payment of refunds by large producers, the Commission provided that "to the extent that a pipeline-purchaser and first seller agree on an amount of Section 110 allowances owed by the pipeline to the first seller, such amount *shall be offset against the amount of the Btu refund due to the pipeline*". (Emphasis added.) A copy of Order No. 399-A is attached as Appendix E.

ARGUMENT

11. AGD respectfully requests the Court to issue an order directing the Commission to comply promptly with this Court's mandate by reinstating the terms of FERC Order No. 399. *Such an order is required because Order No. 399-A effectively frustrates this Court's mandate in this case.*

12. The mandate issued in this case requires two things: (a) an immediate rate reduction by all first sellers to reflect the adoption of the "wet" Btu standard of measurement (this part of the mandate has been implemented pursuant to FERC Order No. 356, issued January 19, 1984), and (b) the refund of all first seller's overcharges resulting from Btu measurements made pursuant of [sic] the now-vacated "dry Btu" rule. (This part of the mandate would have been implemented by November 5, 1984 under the terms of Order No. 399; under Order No. 399-A, the refund portions of the mandate may never be implemented.

13. FERC's Order No. 399-A effectively defeats the orderly and prompt refund process adopted in Order No.

399 and made necessary by this Court's mandate in this case. Order No. 399 required gas producers/first sellers to make cash refunds of Btu-measurement-overcharges by either November 5, 1984 or by May 3, 1985. Pipelines receiving these cash refunds were required by Order No. 399 promptly to pass on these payments to their customers in lump sum payments to those customers actually overcharged.

14. Order No. 399-A explicitly provides that pipelines and producers "may choose the method of payment" of refunds for Btu-measurement-overcharges. *See* Order No. 399-A, Ordering Paragraph D (p. 45). That order provides that "to the extent that a pipeline-purchaser and first seller agree on an amount of Section 110 allowances owed by the pipeline to the first seller, such amount shall be offset against the amount of the Btu refund due to the pipeline". *The effect of Order No. 399-A is to place in the hands of the gas pipelines and the gas producers the determination of the amount of refunds the gas consumer will receive as a result of being the victim of FERC's now-vacated rule on Btu measurement.* This extraordinary, unprecedented refund procedure represents an abdication by FERC of the duty it had to implement this Court's mandate. Two private parties, neither of which has any interest in whether the gas consumer ever receives one cent of refunds, have been allowed to bargain with each other (until December 31, 1984) over the amount of cash refunds that will be paid to the consumer as a result of this Court's August 9, 1983 ruling.

15. The Court will observe that the enforcement of its mandate herein is not being requested by all the parties which were "successful" in this proceeding. Apart from Laclede Gas Company, a local gas distribution company, the other Petitioners in this case were either interstate gas pipelines or, in the case of I.N.G.A.A., a trade association representing gas pipelines. The fact that none of

these pipeline petitioners has chosen to bring FERC Order No. 399-A to the Court's attention as a departure from or frustration of the Court's mandate in this proceeding is understandable. At least some of the larger interstate pipelines have urged FERC to adopt a refund order permitting them to bargain with their producer-suppliers concerning the latters' refund obligations resulting from this Court's ruling. *See* the Commission's references to the positions of Tennessee Gas Pipeline Company, Consolidated Gas Transmission Corporation, Panhandle Eastern Pipe Line Company and Trunkline Gas Company (pp. 23 and 34, Order No. 399-A). Order No. 399-A makes plain the fact that the "offset" approach to the determination of refunds was advocated by both the pipelines *and the producers*, but opposed by AGD.

WHEREFORE, for the reasons stated above, AGD respectfully requests the Court to grant the relief requested herein, i.e. to enforce its mandate in this proceeding by issuing an order requiring FERC to comply with its mandate in this case by reinstating FERC Order No. 399 or otherwise prohibiting pipelines and producers from jointly determining the producers' obligations to make the cash refunds necessary to redress the irreparable injury sustained by the nation's gas consumers as a result of FERC's invalid "dry Btu" order.

Respectfully submitted,

By: /s/ Frederick Moring
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Dated: November 21, 1984
Washington, D.C.

APPENDIX D

ASSOCIATED GAS DISTRIBUTORS

Atlanta Gas Light Company

Subsidiaries:

Georgia Gas Company
Georgia Engine Sales & Service Co.
Trustees Investments, Inc.

Baltimore Gas & Electric Company

Subsidiaries:

Safe Harbor Water Power Corporation
Diversified Holdings, Inc.

Subsidiaries:

Baltimore Biogas, Inc.
Baltimore Capital Resources, Inc.
Resource & Property Management, Inc.

Bay State Gas Company

Subsidiaries:

Bay State Energy Resources, Inc.
Bay State Exploration, Inc.
Bay State Gas Supply, Inc.
Northern Utilities, Inc.

Subsidiary:

Granite State Gas Transmission, Inc.

The Berkshire Gas Company

Boston Gas Company

Parent: Eastern Gas and Fuel Associates

The Brooklyn Union Gas Company

Subsidiaries:

Fuel Resources, Inc.
Gas Energy, Inc.

Star Enterprises, Inc.
Methane Development Corp.

Affiliate: Honeoye Storage Corp.

Central Hudson Gas & Electric Corporation

Subsidiaries:

Central Hudson Enterprises Corp.
Central Hudson Cogeneration, Inc.
CH Resources, Inc.
Greene Point Development Corp.
Phoenix Development Co., Inc.

Chesapeake Utilities Corporation

Subsidiary:

Eastern Shore Natural Gas Co.
Subsidiaries:

Dover Exploration Co.
Skipjack, Inc.
Sharpgas, Inc.

City of Holyoke, Mass., Gas & Electric Department

City of Norwich, Dept. of Public Utilities

City of Westfield Gas & Electric Light Department

Colonial Gas Company

Subsidiaries:

Transgas, Inc. (Mass.)
Massachusetts Associates, Inc. (Mass.)

Commonwealth Gas Co.

Parent: Commonwealth Energy System

Concord Natural Gas Corporation

Subsiidary: Concord Gas Service Corp.

Consolidated Edison Company of New York, Inc.

Delmarva Power & Light Company

Subsidiaries:

Delmarva Energy Company
Delmarva Industries, Inc.
Delmarva Capital Investments, Inc.

Subsidiary: DCII, Inc.

Elizabethtown Gas Company

Parent: NUI Corporation

EnergyNorth, Inc.

Subsidiaries:

Gas Service, Inc.

Subsidiary: Energy Resources Corp.

Manchester Gas Co.

Subsidiaries:

Rent-A-Space of New England, Inc.
EnergyNorth Realty, Inc.

Essex County Gas Company

Fitchburg Gas & Electric Light Company

Subsidiary: Fitchburg Energy Development Co.

Lynchburg Gas Company

Subsidiary: Lynco Development Corp.

New Jersey Natural Gas Company

Parent: New Jersey Resources Corporation

New York State Electric & Gas Corporation

Subsidiary: Somerset Railroad Corporation

North Carolina Natural Gas Corporation

Subsidiaries:

NCNG Exploration Corp.
Cape Fear Energy Corp.

Northeast Georgia Municipal Gas Utilities

City of Bowman, Ga.
City of Buford, Ga.
City of Commerce, Ga.
City of Covington, Ga.
City of Elberton, Ga.
City of Hartwell, Ga.
City of Lawrenceville, Ga.
City of Madison, Ga.
City of Monroe, Ga.
City of Royston, Ga.
City of Social Circle, Ga.
City of Sugar Hill, Ga.
City of Toccoa, Ga.
City of Union Point, Ga.
City of Winder, Ga.

Subsidiaries:

The Connecticut Light & Power Co.
Western Massachusetts Electric Co.
Holyoke Water Power Company
Northeast Utilities Service Co.
Northeast Nuclear Energy Co.

Northern Utilities, Inc.

See Bay State Gas Company

Pennsylvania Gas & Water Company

Parent: Pennsylvania Enterprises, Inc.

Pequot Gas Co.

Philadelphia Electric Company

Subsidiaries:

Adwin Equipment Company
Adwin Realty Company
Conowingo Power Company
Eastern Pennsylvania Development Company
Eastern Pennsylvania Exploration Company

Philadelphia Electric Power Company
The Susquehanna Electric Company
The Susquehanna Power Company

Philadelphia Gas Works

Providence Gas Company
Parent: Providence Energy Corporation

Public Service Company of North Carolina, Inc.
Subsidiary:

PSNC Natural Resources Corporation

Subsidiaries:

Tar Heel Energy Corp.
PSNC Production Corp.
PSNC Exploration Corp.
PSNC Propane Corp.

Public Service Electric & Gas Co.

Subsidiaries:

Energy Development Corporation

Subsidiary:

Gasdel Pipeline System, Inc.

Energy Pipeline Corporation
Energy Terminal Services Corporation
Mulberry Street Urban Renewal Corporation
PSE&G Overseas Finance N.V.
PSE&G Research Corporation

South County Gas Co.

South Jersey Gas Co.

Parent: South Jersey Industries, Inc.

The Southern Connecticut Gas Co.

Parent: Connecticut Energy Corp.

UGI Corporation

Subsidiaries:

AmeriGas, Inc.
UGI Development Co.

Valley Gas Co.

Parent: Valley Resources, Inc.

Washington Gas Light Co.

Subsidiaries:

Crab Run Gas Co.
Davenport Insulation, Incorporated

Subsidiaries:

Cellin Manufacturing, Inc.
Universal Insulation, Inc.
Featherstone Manufacturing Co., Inc.

Frederick Gas Co., Inc.
Hampshire Gas Co.
Shenandoah Gas Co.
Brandywood Estates, Inc.

Subsidiary:

Washington Gas Approved Services, Inc.

Rock Creek Properties, Inc.

FILED
SEP 26 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-139

In the Supreme Court of the United States

OCTOBER TERM, 1985

PENNZOIL COMPANY, ET AL., PETITIONERS

v.

ASSOCIATED GAS DISTRIBUTORS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals erred in treating a mandamus petition as if it were a petition for review of an order of the Federal Energy Regulatory Commission.

2. Whether the court of appeals erred in setting aside that order of the Federal Energy Regulatory Commission, which permitted natural gas producers to offset amounts owed them by pipelines when making refunds to the pipelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 756 F.2d 166 (D.C. Cir. 1985). The orders denying rehearing (Pet. App. 132a-135a) and suggestions for rehearing en banc (Pet. App. 136a) are unreported. The orders of the Federal Energy Regulatory Commission (Pet. App. 16a-80a and 81a-126a) are reported at 49 Fed. Reg. 37735 (1984) and 49 Fed. Reg. 46353 (1984).

JURISDICTION

The judgment of the court of appeals (Pet. App. 130a-131a) was entered on March 5, 1985. Petitions for rehearing and rehearing en banc were denied on May 6, 1985 (Pet. App. 132a-135a) and on May 15, 1985 (Pet. App. 136a), respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 15 U.S.C. 3416(a)(4).

STATEMENT

1. In *Interstate Natural Gas Association of America* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (*INGAA I*), the court of appeals held that the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.* (NGPA) required use of the "wet" method of measurement rather than the "dry" method to determine the Btu content of natural gas for the purpose of pricing under Title I of that Act. The upshot of that determination was that the Federal Energy Regulatory Commission's "dry" rule was vacated and natural gas producers were required to make substantial refunds to pipeline companies which, in turn, were required to make refunds to natural gas customers. Accordingly, following issuance of the judgment of the District of Columbia Circuit in *INGAA I*, the Commission, in Order No. 399 (Pet. App. 16a-80a), established procedures under which the producers would make those refunds. In that order, the Commission denied the producers' request that they be permitted to offset amounts owed them by the pipelines under unrelated Commission orders dealing with production-related costs, known as "Section 110 costs." Pet. App. 6a-8a.

The producers sought rehearing. In Order No. 399-A (Pet. App. 81a-126a), the Commission denied rehearing on most issues raised by the producers, but granted rehearing on the offset question. On that issue, the Commission reversed its prior decision and directed the producers to offset the Section 110 (15 U.S.C. 3320), costs owed them against amounts due the pipelines because of the invalidation of the dry rule.[1]

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[1] The Commission adopted the offset procedure because it concluded that it would provide for the timely payment of both the dry rule refunds and the Section 110 costs. The Commission noted that numerous interstate pipelines had not paid the Section 110 costs they owed producers, despite the fact that the order requiring the payment of Section 110 costs ordered that they should commence in March 1983,

Associated Gas Distributors (AGD), contesting the offset procedures adopted in Order No. 399-A, filed for rehearing with the Commission on that issue (Pet. App. 128a). They also filed a petition for mandamus in the District of Columbia Circuit, seeking an order invalidating the offset procedure on the ground that it was inconsistent with the court's mandate in *INGAA I*. Meanwhile, the producers—one day before AGD sought mandamus in the District of Columbia Circuit — filed petitions for review of Order No. 399 and Order No. 399-A in the Fifth Circuit (Pet. App. 9a).

2. Following briefing and oral argument, the panel of the District of Columbia Circuit that had decided *INGAA I* then issued the decision challenged by petitioners. It decided that, in order "not [to] enter the debate over the propriety of resort to mandamus in this case" (Pet. App. 9a), it would treat AGD's mandamus petition as a petition for review. The court then concluded that the offset provision "must be set aside" (*id.* at 11a). The court determined that the offset procedure would only further delay refunds of dry rule overcharges, since the pipelines had appealed the Commission's order regarding Section 110 costs to the Fifth Circuit, which had not issued a decision at that time. The court concluded that further delay was contrary to the teaching of *FPC* v. *Tennessee Gas Transmission Co.*, 371

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and that, although the order had been appealed to the Fifth Circuit, the order had not been stayed. The Commission also concluded that the offset would come close to matching the customers who were entitled to dry rule refunds with those who caused the incurrence of the Section 110 costs. In addition, the Commission noted that, commencing January 1, 1985, the price of a large portion of flowing natural gas would be deregulated at the wellhead. It was the Commission's opinion that, by utilizing the offset mechanism, most producers and pipelines could complete the refund process prior to the commencement of deregulation, thus leaving the market price for the deregulated gas undistorted by past costs. Pet. App. 85a-109a.

U.S. 145 (1962), in which the Court held that refunds must be implemented "at the earliest possible moment consistent with due process" (Pet. App. 11a, quoting 371 U.S. at 155).

Judge Scalia issued a concurring opinion. He observed that, irrespective of whether the Section 110 cost orders were still being contested in the Fifth Circuit, if those Section 110 costs were owed, "*the set-off constitutes immediate payment*" (Pet. App. 14a (emphasis in original)).[2] The panel subsequently denied rehearing (*id.* at 132a) and, at that time, Judge Scalia substituted a dissent for his concurrence (*id.* at 133a-135a). In that dissent, he concluded that mandamus was not warranted, since *INGAA I* had merely directed the Commission to vacate its dry rule and the Commission "retain[ed] discretion to determine both the amount and the manner of refund" (Pet. App. 133a). Judge Scalia further concluded that if the mandamus petition was viewed as a petition for review, then the Fifth Circuit would be the proper forum for such review since the first petition for review had been filed there. He reasoned that Congress's intention was to place review of the same order in a single court, not to have piecemeal review of such orders, so that the District of Columbia Circuit should have transferred the case to the Fifth Circuit (*id.* at 133a-134a).

3. A number of relevant events occurred after the District of Columbia Circuit issued its judgment. First, pursuant to the decision of the District of Columbia Circuit, the Commission, on July 18, 1985, granted rehearing of Order No. 399-A. It issued Order No. 399-B (Pet. App. 1b-9b), requiring the producers to refund the dry rule overcharges to the pipelines, without offsetting any Section 110 costs, by August 30, 1985 (Pet. App. 7b). Then, on August 19, 1985,

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[2]Judge Scalia concurred, however, because he concluded that "the agency's action, however well intentioned, constitutes an attempt to increase rates retroactively" (Pet. App. 15a).

Fifth Circuit issued its decision in the Section 110 case, *Texas Eastern Transmission Corp.* v. *FERC*, No. 83-4390. It rejected the pipelines' arguments and largely affirmed the Commission's order (slip op. 33). Finally, on the same day, the Fifth Circuit transferred the petitions for review of Order No. 399 and Order No. 399-A to the District of Columbia Circuit, pursuant to 28 U.S.C. 2112(a), stating that it was doing so "in the interest of justice."

ARGUMENT

Although in our view the District of Columbia Circuit erred procedurally and substantively, there is no reason to believe that its decision will have any effect beyond the unusual circumstances of this case. Therefore, review by this Court is not warranted.

1. As Judge Scalia concluded, the court erred procedurally because it should not have treated the mandamus petition as a petition for review. Moreover, 15 U.S.C. 3416(a)(4) requires review of the Commission's decisions to be based on the record, which was never filed with the District of Columbia Circuit.[3]

Substantively, the offset approach that the Commission adopted in Order No. 399-A was fully consistent with decisions holding that Congress did not specify how refunds were to be computed but rather left that function to the reasoned discretion of the Commission. See, *e.g.*, *Belco Petroleum Co.* v. *FERC*, 589 F.2d 680, 686 (D.C. Cir. 1978). To be sure, the panel majority is correct that this Court's decision in *Tennessee Gas* requires the payment of refunds at the earliest possible moment consistent with due process. But, as Judge Scalia stated in his initial concurrence (Pet. App. 14a), if the Section 110 costs were in fact

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[3]Section 3416(a)(4) states that "the Commission shall file with the court the record upon which the order complained of was entered, as provided by section 2112 of Title 28."

owed to producers, "the set-off constitutes immediate payment." Therefore, permitting the producers to offset Section 110 costs in making refunds was not inconsistent with *Tennessee Gas*.

2. Nevertheless, this peculiar case does not warrant review by this Court. The conditions that led the court of appeals to err procedurally are not common. In this case, the Commission issued a decision following a judgment by a court of appeals that arguably offended the court's mandate, but the decision was appealed to another court of appeals. Contrary to petitioner's claim, we think it unlikely that this factual pattern is likely to recur frequently.

Moreover, since the Fifth Circuit has decided that petitions for review of the Commission's dry rule orders ought to be considered by the District of Columbia Circuit, the District of Columbia Circuit's decision to treat the mandamus petition as a petition for review appears to be harmless error. An order by this Court requiring the District of Columbia Circuit to vacate its decision and transfer the case to the Fifth Circuit, which would then presumably transfer it back to the District of Columbia Circuit, would be a useless exercise. Therefore, even if the procedural problems presented by this case were sure to arise again, it would seem preferable to wait for another case.

Substantively, we do not think that the question whether an offset is an immediate payment — or whether, as the court of appeals held, *Tennessee Gas* requires immediate cash refunds — requires the Court's attention at this time. There is no conflict on this issue. Moreover, since the Commission ordered the producers to pay the dry rule overcharges by August 30, and no stay was obtained, the refunds should already have been made without offset. Finally, given the Fifth Circuit's recent decision in *Texas Eastern* affirming outstanding Commission orders requiring payment of Section 110 costs, such payments should

occur in the near future. In short, the producers and the pipelines should have squared their accounts by the time this Court could resolve the issue, and there is no pressing need for review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOEL M. COCKRELL
Attorney
Federal Energy Regulatory Commission

SEPTEMBER 1985

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*Acting Solicitor General Fried is disqualified in this case.

DOJ-1985-09